Supreme Court, U.S.
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No. 96-

In The

Supreme Court of the United States

October Term, 1996

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,

Petitioners,

v.

MARIO CANSECO, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 7, 1997

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159 pp

QUESTIONS PRESENTED

1. Whether jurisdiction exists under the Employee Retirement Income Security Act ("ERISA") for a federal court to decree that a pension benefit adopted in 1963 by the settlors of the petitioner Pension Trust and retained post-ERISA as an optional pension benefit available in addition to the ERISA-required pension benefit must be judicially reinterpreted to provide benefits paid retroactive to the date a participant reaches age 62 notwithstanding that the plain language of the 1963 plan and the factual history of the Trustees' interpretation and maintenance of that plan from 1963 through 1974 and from 1975 to the present demonstrates that the pension benefit first promised in 1963 and maintained to this day is not a benefit commencing at age 62 but is a promise only of a benefit which commences and which is paid prospectively as of the later of the date on which one turns age 62 or applies for the benefit.

2. Whether a federal court exceeds its supervisory authority under ERISA when it (a) construes the language of an optional pension benefit to require monthly benefits be paid retroactive to the date one becomes "eligible" by achieving 15 years of pension credit and age 62, (b) construes as "merely procedural" the requirement that benefits commence only after the later of the date one reaches age 62 or applies for the pension, and (c) decrees that the contrary interpretation of the Trustees is arbitrary and capricious when the undisputed record on summary judgment establishes (1) that the collective bargaining parties and settlors (the "Settlors") of the Pension Trust, in adopting the pension plan in 1963,

QUESTIONS PRESENTED – Continued

never promised a pension benefit that would be payable from the date one reached age 62, but, instead, only promised a monthly pension benefit that was payable prospectively from the later of the date on which one reached age 62 or applied for the pension, (2) that the Trustees uniformly interpreted the pension plan throughout a thirty-three year period to require that monthly payments commence prospectively only from the later of the date on which one turned age 62 or an application was received, (3) that the Trustees, in adopting a pension benefit in compliance with ERISA in 1976, chose to retain the 1963 pension plan as an optional pension benefit and changed it substantively only by liberalizing the application requirement to permit retroactive payments back to the maximum benefit commencement date established by ERISA (March 1 of the year following the year in which one turns age 65) and (4) that the Settlors and Trustees, while opting not to eliminate the application requirement, did exercise their respective collective bargaining and fiduciary discretion systematically over the thirty-three year history of the plan to improve benefits for all participants in innumerable ways, including (i) increasing by 1600% the amount of monthly pension payment received for each year of pension credit by all participants, including Respondents, and (ii) increasing the value of pension benefits promised from nineteen million dollars in 1963 to six hundred million dollars in 1975 to more than one billion dollars in 1985.

PARTIES TO THE PROCEEDING

Petitioners are the Construction Laborers Pension Trust for Southern California and its Board of Trustees, consisting of 16 individuals, half of whom are appointed by the Southern California District Council of Laborers and half of whom are appointed by the multiemployer trade associations that sponsor the Pension Trust, the Associated General Contractors of California, Inc., the Building Industry Association of Southern California, Inc., the Engineering Contractors Association, Inc., and the Southern California Contractors Association, Inc.

Respondents are individuals and class representatives Mario Canseco, James Daniels, Manuel Delgado, Jessie Riley and Corse Whitehurst, Jr. and the class of individuals similarly situated.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the Construction Laborers Pension Trust for Southern California ("Pension Trust") and the Board of Trustees for the Construction Laborers Pension Trust for Southern California ("Trustees"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 20, 1996.

Review is necessary to resolve the conflict over the limits of federal court jurisdiction under the Employee Retirement Income Security Act of 1974 ("ERISA"). The First, Second, Sixth and (heretofore) Ninth Circuits hold that pension plan provisions and plan interpretations in effect and settled prior to January 1, 1975 are beyond the scope of review by federal courts. The Third, Fourth and Fifth Circuits (and this decision of the Ninth Circuit) hold that such long-settled provisions may be reviewed and judicially reinterpreted if the Trustees apply the settled language and interpretations to any participant by denying benefits after January 1, 1975.

Review is further necessary to reinstate this Court's policy of judicial deference to trustee interpretations of pension plan provisions adopted in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). The Ninth Circuit, while acknowledging that the policy of judicial deference set forth in *Firestone* is required in this case, nevertheless eschews deference and rules that a federal court may review plan language *ad hoc*, substituting its interpretation for that of the Trustees simply by declaring that various provisions of the plan

should be accorded a different emphasis than that determined by the Trustees.

Finally, review by this Court is urgently needed to guide the lower courts and to affirm ERISA's intent to promote the establishment of privately-administered employee benefit plans by permitting the settlors and the trustees of those plans responsibly to allocate limited benefits among the competing interests of all plan participants. This interest is seriously undermined by judicial rebalancing of participant rights undertaken decades after the settlors and trustees have acted and on a record which focuses primarily on the interests of plaintiff participants with negligible judicial appreciation of or consideration for the interests of all other participants to whom the trustees retain responsibilities.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 93 F.3d 600 (9th Cir. 1996), and appears in the Appendix ("App.") at App. 12-23. The judgment of the Court of Appeals appears at App. 24-25. The order of the Court of Appeals denying Petitioners' petition for rehearing and rejecting Petitioners' suggestion for rehearing en banc is unreported and appears in the Appendix at App. 26-27. The findings of fact and conclusions of law of the United States District Court for the Central District of California granting Petitioners' motion for summary judgment are unreported and appear in the Appendix at App. 28-46.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 20, 1996 and filed on October 28, 1996. Petitioners' petition for rehearing and suggestion for rehearing en banc was denied on October 7, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves Sections 404(a)(1), 502, 503, and 514 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1104(a)(1), 1132, 1133, and 1144, and Section 302 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 186. Pertinent portions of these provisions are reproduced in the Appendix at App. 63-107.

STATEMENT OF THE CASE

Petitioners are the Construction Laborers Pension Trust for Southern California ("Pension Trust") and its Board of Trustees ("Trustees"). The Pension Trust provides a plan of benefits required by ERISA. App. 7-8, n.5; 71-100. In addition, it continues to offer as an optional form of benefit, the original pension benefit adopted by the collective bargaining parties and settlors ("Settlors") of the Pension Trust in 1963. *Id.* This original pre-ERISA benefit has, for 33 years, commenced payments prospectively and not retroactively from the date of the later of

one reaching age 62 or applying for the benefit. App. 52-54 (Art. 2.02, 2.04, 2.06); App. 119 and 122; App. 75 (Art. 2.02); and App. 94-96 (Art. 5.01, 5.03 and 5.04). When this original benefit was continued post-ERISA, it was liberalized to provide that, when an application was received years after one reached age 62, the pension benefit would commence no later than the maximum commencement date established by ERISA (March 1 of the year following the year in which one turns age 65). App. 96-97 (Art. 5.04). No other substantive change to the original pre-ERISA plan was made. App. 119-20.

Respondents represent the class of plan participants who have not submitted an application to the Pension Trust until after their 62nd birthday.

On cross-motions for summary judgment, the District Court ruled in Petitioners' favor on all of Respondents' then pending claims. The District Court held that the Trustees' interpretation of the pre-ERISA plan is supported by the plain language of the plan and is not arbitrary and capricious. App. 42, ¶ 20. The District Court further concluded:

> [U]ntil the employee files an application for benefits, his rights are not "unconditional"; and since benefits at age 62 are in excess of ERISA requirements, [Respondents'] rights to those benefits are not "legally enforceable" against [Petitioners] until the application for benefits is filed by the employee.

App. 44, ¶ 29.

The District Court noted:

> **As determined hereinabove, the plain language of the Pension Plan requires an**

> **application be filed before benefit payments begin. To allow recovery against the [Pension Trust] would contradict the written provisions of the Pension Plan.**

App. 45, ¶ 37, (emphasis added).

On appeal, the Court of Appeals reversed the District Court. It concluded that it had subject matter jurisdiction, notwithstanding that the age 62 benefit commencing no earlier than the date of application requirement was established in 1963 and had been interpreted uniformly by the Trustees from that date through 1974 and from 1975 through the present, because the Trustees' denial of Respondents' applications constituted "a significant act of discretion under or interpretation of a pension plan after January 1, 1975." App. 2-3, n.1. The Court of Appeals further found that the "plain language" of the plan defining an employee as "eligible" upon reaching age 62 and 15 years of service is language which requires payment of benefits from and after the 62nd birthday. App. 13. The Court of Appeals held that the plain language of the application requirement upon which the District Court and the Trustees in part based their interpretation of the plan to be language which conflicts with the "eligibility" language and language that sets forth a procedural requirement only. App. 15-16.

Petitioners' petition for rehearing and suggestion for rehearing en banc was denied (App. 26-27), and Petitioners now seek review in this Court.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE NINTH CIRCUIT THAT IT HAS JURISDICTION UNDER ERISA TO OVERTURN A 1963 PENSION PLAN APPLICATION REQUIREMENT AND A THIRTY-THREE YEAR HISTORY OF UNIFORM TRUSTEE INTERPRETATION OF THAT REQUIREMENT IS A DECISION IN CONFLICT WITH ESTABLISHED CASE LAW IN THE FIRST, SECOND AND SIXTH CIRCUITS AND WITH PRIOR CASE LAW IN THE NINTH CIRCUIT, BUT COMPORTS WITH CASE LAW IN THE THIRD, FOURTH AND FIFTH CIRCUITS; A DECISION OF THIS COURT IS NECESSARY TO CLARIFY THE SCOPE OF JUDICIAL REVIEW OF LONG-SETTLED PLAN PROVISIONS UNDER ERISA.

Section 514(b)(1) of ERISA, 29 U.S.C. § 1144(b)(1), excludes from coverage under ERISA "any cause of action which arose, or any act or omission which occurred before January 1, 1975." The Court of Appeals held:

> "[W]e have held that there is an 'act or omission' within the meaning of § 1144(b)(1) where 'benefits have been denied as a result of significant act of discretion under or interpretation of [a pension] plan [.]' " *Smith v. Retirement Fund Trust of the Plumbing, Heating and Piping Industry*, 857 F.2d 587, 590 (9th Cir. 1988). Here, the Trustees denied benefits pursuant to their discretionary authority under the [Pension Trust's] plan. Jurisdiction was therefore proper in the District Court.

App. 3, n.1.

This interpretation of the "act or omission" requirement of Section 514(b)(1) conflicts with the interpretations of the First, Second and Sixth Circuits and with prior decisional law in the Ninth Circuit. The nature of the conflict between the circuits is discussed at length by the Sixth Circuit Court of Appeals in *Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 449-55 (6th Cir. 1992).

The Circuit Courts of Appeals have agreed uniformly that section 514(b)(1) contains a two-prong test requiring (1) a determination of the time the cause of action arose, and (2) a determination of the time of acts or omissions. *Id.* at 450-51. Similarly, the Circuit Courts have uniformly agreed that the first prong, the date on which the cause of action arises, is the date a claim for benefits has been made and formally denied. *Id.* at 451.

The date of "any act or omission" is the prong on which the conflict between the Circuits occurs. The Third, Fourth and Fifth Circuits have adopted the view that a post-ERISA denial of a pension is the act or omission that is subject to ERISA and have disregarded the existence and controlling influence of pre-ERISA events. *Id.*; see, *Tanzillo v. Local 617, International Brotherhood of Teamsters*, 769 F.2d 140, 144 (3rd Cir. 1985); *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir.), *cert. den.*, 493 U.S. 872, 110 S.Ct. 202, 107 L.Ed.2d 155 (1989) (citing cases); *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 971 (5th Cir. 1981). The effect of the decision of the Court of Appeals in this action is to adopt the view that the mere denial of benefits post-ERISA is the "act or omission" sufficient to establish post-January 1, 1975 jurisdiction.

The First, Second, Sixth and Ninth Circuits have expressed the contrary view:

> Under this view if the trustee's denial is based on events that occurred and plan provisions adopted before 1975, then the denial is not reviewable.

Stevens, supra, at 451; see also, *Quinn v. Country Club Soda Co.*, 639 F.2d 838, 841 (1st Cir. 1991); *LaMontagne v. United Wire, Metal & Mach. Pension Fund*, 869 F.2d 153, 157 (2nd Cir.), cert. den., 493 U.S. 818, 110 S.Ct. 72, 107 L.Ed.2d 39 (1989); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1503 (9th Cir. 1984).

In adopting the latter interpretation, the Sixth Circuit, in *Stevens*, stated:

> ERISA jurisdiction will not lie in cases where a pension plan denies the applicant's claim after January 1, 1975, but the plan administrator exercised no discretion in so denying because the ultimate benefit decision was completely dictated by the pre-1975 events.

Stevens, supra at 452.

The Sixth Circuit noted that all Circuit Courts of Appeals have agreed that the "cause of action" and the "act or omission" components of Section 514(b)(1) are to be read in the disjunctive. Thus, the Sixth Circuit reasoned:

> Viewing a pension plan's denial of benefits not only as the trigger of the cause of action but also as the critical "act or omission" subject to ERISA renders the "act or omission" language superfluous. The interpretation we adopt gives the

"act or omission" clause the separate and distinct meaning from the "cause of action" clause that the language suggests.

Our interpretation also gives meaning to the language that the pre-emption provision does not apply to "*any* act or omission which occurred" before 1975. In interpreting a statute, we must strive to give effect to all of its language. [citation omitted]. "*[A]ny* act or omission" does not mean the most recent relevant act or omission; rather, it means an event that occurred before 1975 on which a pension fund bases a post-1975 decision. By disregarding pre-1975 events and focusing solely on the benefit denial, courts have unfortunately read the term "any" out of Section 1144(b)(1) and ignored the clear directive of the provision.

Further, the construction of Section [514(b)(1)] adopted by the Third, Fourth and Fifth Circuits, robs the entire effective date provision of any practical meaning. Under their interpretation [and the interpretation of the Ninth Circuit in this case], ERISA becomes retroactive to the date on which a litigant enrolled in his pension plan. Thus, the time of the claim denial would always determine the choice of law and jurisdiction. We do not believe Congress intended this result.

Id.

Finally, the Sixth Circuit explained:

"By holding that ERISA does not apply to the denials of benefits based on pre-1975 events, we protect plan fiduciaries – potential defendants – from 'retroactive application of remedial principles not in effect at the time of the conduct in question.' " *Menhorn*, 738 F.2d at 1500 n.3. As

> one commentator concluded, the position we adopt "insures that the law applied to a case is that which a trustee could have relied upon when he acted, and not standards that he could not reasonably anticipate." [citation omitted].

Id., at 453.

The decision in the Ninth Circuit in this case illustrates squarely the propriety of the reasoning adopted by the Sixth Circuit in *Stevens*. Trustees at common law and under ERISA are obligated to follow the terms of their plan documents and the dictates of their settlors. The record is uncontradicted here that the Settlors adopted and the Trustees implemented the 1963 benefit as one which did not commence pension benefits after age 62 until an application was received and which paid those benefits prospectively only from the later of the date of application or the 62nd birthday. App. 52-54 (Art. 2.02, 2.04, 2.06); App. 119 and 122; CR. 79, Supp. ER. 1-3 (Asheroff Dec.); CR. 80, Supp. ER. 41-42 (Smith Dec.); CR. 77, Supp. ER. 45-47.[1] The record is uncontradicted that the Trustees maintained this interpretation faithfully through 1975. *Id.* In continuing the age 62 benefit as an optional benefit under ERISA from and after 1976, the record is clear that the benefit intended and continued by the Trustees was one which did not commence unless and

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[1] References to the record in the Ninth Circuit are delineated as follows: References to the Clerk's Record are designated "CR." References to the Excerpt of Record filed by Respondents are designated "ER." References to the Supplemental Excerpts of Record filed by Petitioners are designated "Supp. ER."

until an application was received [except for the liberalization that permitted retroactive payments back to the maximum commencement date of ERISA (March 1 of the year following the year in which a participant reaches age 65)]. *Id.* Based on this record, if the Trustees had been bold enough to grant the named class representatives retroactive benefits back to age 62, the Trustees would have violated their obligation to follow the language of the plan documents as originally set forth in 1963 and continued through today and would have failed to follow the uniform interpretation of the plan maintained by the Trustees for over three decades. Thus, if the Trustees had elected on their own to interpret the plan in the manner adopted by the Court of Appeals, the Trustees would have breached their fiduciary duty.

The interpretation of the plan that offended the Court of Appeals was established more than a decade before January 1, 1975. The post-1975 act of denying the class representatives' requests for retroactive benefit payments was not a significant act of discretion, it was a ministerial act compelled by the plan documents and thirty-three years of consistent trustee plan interpretation and history. No act or omission other than ministerial denial occurred after January 1, 1975. All acts of discretion or omissions of consequence occurred before January 1, 1975. Petitioners submit the Ninth Circuit lacked jurisdiction under ERISA to conclude otherwise and urge this Petition be granted to clarify and to bring uniformity to the scope of ERISA jurisdiction.

II.

THE NINTH CIRCUIT HAS MISAPPLIED THIS COURT'S HOLDING IN *FIRESTONE TIRE & RUBBER CO. V. BRUCH*, RENDERING INAPPLICABLE IN THE NINTH CIRCUIT THIS COURT'S RULE OF JUDICIAL DEFERENCE TO TRUSTEE INTERPRETATIONS OF PLAN PROVISIONS.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), this Court determined:

> Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. See Restatement (Second) of Trusts § 187 (1959) ("[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion.") See also G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 560, pp. 193-208 (2d rev. ed. 1980). A trustee may be given power to construe disputed or doubtful terms and in such circumstances the trustee's interpretation will not be disturbed if reasonable. *Id.*, § 559 at 169-171. . . . Hence over a century ago, we remarked that "[w]hen trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act." *Nichols v. Eaton*, 91 U.S. 716, 724-725, 23 L.Ed. 254 (1875).

Id., at 111, emphasis added.

Based upon the foregoing, this Court stated:

> We hold that a denial of benefits challenged under [Section 514(a)(1)(B), 29 U.S.C.]

> § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Id., at 115.

The Court of Appeals in this case admits that the deferential standard of review is required:

> In this case the trust agreement establishing the CLPT plan grants the trustees' discretion to construe the terms of the CLPT plan because it provides that the trustees shall have the power to administer the [CLPT] Fund[,] including the power to construe the provisions of the [CLPT] plan[,] and "that any such construction adopted by the board in good faith shall be binding upon any and all parties or persons affected thereby."

App. 10-11.

Having acknowledged the limitations upon the scope of its review, the Court of Appeals ignores completely the conduct and history of the Trustees in their interpretation of the application requirement of the pre-ERISA age 62 pension plan.[2] The Court of Appeals simply reads the

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[2] As this Court noted in *Firestone*:

> The terms of trusts created by written instruments are "determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trusts as is not inadmissible." Restatement (Second) of Trusts § 4, Comment d (1959).

489 U.S. at 115.

plan for itself and determines that because the "eligibility" requirements for the plan are set forth in Article II of the Pension Plan and the application requirement is contained in Article V of the Pension Plan, the application requirement cannot add an additional "eligibility" requirement. The Court of Appeals labels Article V "procedural" and concludes that it does not bar retroactive payments back to the date on which one reaches age 62.

The record on appeal contains extensive submissions by the Trustees, tracing the origin of the application requirement from the original adoption of the pension plan in 1963 by the Settlors of the Pension Trust. App. 52-54 (Art. 2.02, 2.04, 2.06); App. 119 and 122; CR. 79, Supp. ER. 1-3 (Asheroff Dec.); CR. 80, Supp. ER. 41-42 (Smith Dec.); CR. 77, Supp. ER. 45-47. This record establishes that the application provisions dismissed by the Court of Appeals because they appeared in Article V were in fact part of Article II from 1963 until the plan was restated to incorporate the benefits mandated by ERISA. App. 52-54 (Art. 2.02, 2.04, 2.06); App. 119 and 122; App. 75 (Art. 2.02) and App. 94-96 (Art. 5.01, 5.03, 5.04). The Trustees further set forth extensive evidence of the history of and intent behind the restatement of the plan to implement the requirement of ERISA. This evidence demonstrates that the relocation of the application requirement from Article II to Article V was a non-substantive relocation. See, e.g., App. 119, 122, and 114-16.

The record further establishes that the Trustees have always interpreted the commencement of benefit requirement under the plan as being one which begins on the later of the date one reaches age 62 or files an application. App. 52-54 (Art. 2.02, 2.04, 2.06); App. 119 and 122; CR.

79, Supp. ER. 1-3 (Asheroff Dec.); CR. 80, Supp. ER. 41-42 (Smith Dec.); CR. 77, Supp. ER. 45-47. The record thus demonstrates (as the District Court found) that the language of the pre-ERISA age 62 pension plan is reasonably interpreted to provide that the monthly pension benefit commences only upon the later of attaining age 62 or filing an application. Moreover, the record contains substantial evidence demonstrating that the Trustees systematically managed the pension plans and benefits provided by the Pension Trust over the thirty-three year history of the Trust to improve benefits for all participants, including Respondents. See, e.g., CR. 41, Supp. ER. 272-75 (Ex. 48). This evidence supports the reasonableness of the Trustees in retaining the original application requirement rather than easing it to permit benefit payments retroactive to the date one turns age 62. The Trustees chose to make benefit improvements in other areas. No evidence exists in the record to suggest that the Trustees were not prudently carrying out their duties as fiduciaries.[3]

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[3] One factual finding emphasized by the Court of Appeals merits clarification. The lead plaintiff, Mario Canseco, never applied to the Pension Trust for pension benefits. The District Court found that he omitted to apply because his attorney and his Union told him he was not vested. The Pension Trust and its Trustees are not responsible for advice offered a participant by third parties, including that of a sponsoring Union. *Cleary v. Graphic Communications International Union*, 841 F.2d 444, 447-48 (1st Cir. 1988). Nevertheless, the Court of Appeals stated that the Pension Trust's records "erroneously" indicated that Mr. Canseco had only fourteen and ten-twelfths years of pension credit when, in fact, he had many additional years. The term "erroneous" implies fault on the part of the Pension Trust when none exists. Until a participant files an application with the Pension Trust and submits a work history and an authorization

The Court of Appeals discusses none of the record in this case establishing the facts and circumstances under which the pre-ERISA age 62 benefit was initially established and how it was thereafter consistently interpreted and applied. The Court of Appeals simply concludes that its reading of the language of the Plan compels rejection of the interpretation long adopted by the Trustees and Settlors.

By this standard of review, the Court of Appeals transparently abrogates the requirement of judicial deference recognized in *Firestone*. The Court of Appeals simply determines that the application requirement is to be ignored insofar as it affects the commencement date of pension benefits and that the thirty-three year history of conformity to the original intent of the Settlors is to be declared "arbitrary and capricious" and, therefore, an abuse of Trustee discretion.

This perversion of the standard of review established in *Firestone* if left unaddressed produces immediate conflicts with *Firestone*, with other decisions of this Court

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to obtain social security earnings records, the Pension Trust can only count years of credit known to it from contribution records received from employers contributing to the Pension Trust from 1963 and thereafter and from employers contributing to its sister Health and Welfare Trust which was established in 1955. The combined information from these two sources are the source of the fourteen and ten-twelfths years of credit known to the Pension Trust. CR. 79, Supp. ER. 7-8 (Asheroff Dec.). Because Mr. Canseco never saw fit to apply to the Pension Trust for a pension benefit until 1985, the years of past service credit for which he was eligible to include in his service computation remained unknown to the Pension Trust until he finally applied.

and with other decisions of other circuits. In *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 442, 42 L.Ed. 2d 447 (1974) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824 (1971)), this Court stated:

> Under the "arbitrary and capricious" standard, the scope of review is a narrow one. A review in court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry is to be searching and careful, the ultimate standard of review is a narrow one. . . . "

419 U.S. at 285.

The various Circuit Courts of Appeals have echoed the requirements of this standard of review. The Seventh Circuit has noted that this standard of review "embod[ies] the highest level of deference." *Exbom v. Central States Health & Welfare Fund*, 900 F.2d 1138, 1142 (7th Cir. 1990). If denial of benefits is based on "a reasonable interpretation of the relevant plan documents", it is not to be set aside by the court. *Shull v. State Machinery Co., Inc. Employees Profit Sharing Plan*, 836 F.2d 306, 308 (7th Cir. 1987). The Sixth Circuit has held that the review of a plan administrator's decision is "highly deferential." *Miller v. Metropolitan Life Insurance*, 925 F.2d 979, 983 (6th Cir. 1991). The Third Circuit has concurred. *Jordan v. Retirement Committee of Rensselaer Polytechnic Institute*, 46 F.3d 1264, 1271 (3rd Cir. 1995). The Eleventh Circuit has determined that the court's role is limited to an inquiry whether the decision was made rationally and in good faith. *Guy v. Southwestern Iron Workers Welfare Fund*, 877

F.2d 37, 39 (11th Cir. 1989). And it has stated that the decision need not be the best decision, but only one with rational justification. *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984).

The Fifth Circuit applies *Firestone* by first considering whether the trustee's decision was legally correct. If any doubt remains, it next determines whether, even if legally incorrect, the decision is so indefensible that it amounts to an abuse of discretion. See *Kennedy v. Electricians Pension Plan, IBEW No. 995*, 954 F.2d 1116, 1124 (5th Cir. 1992); *James v. Louisiana Health & Welfare Fund*, 29 F.3d 1029 (5th Cir. 1994); *Batchelor v. International Brotherhood of Electrical Workers, Local 861*, 877 F.2d 441, 442-43 (5th Cir. 1989). To conduct this latter analysis, the Fifth Circuit considers: (1) whether the Trustee has given the plan a uniform construction; (2) whether the Trustee's interpretation of the plan is consistent with a fair reading of the plan; and (3) whether different interpretations will result in non-anticipated costs. *Kennedy*, 954 F.2d at 1121.

The Eighth Circuit Court of Appeals applies *Firestone* through a slightly different test. It assesses: (1) whether the fiduciary's interpretation is consistent with the goals of the plan; (2) whether the interpretation renders any language of the plan meaningless; (3) whether the interpretation conflicts with the substantive or procedural requirements of the ERISA statute; (4) whether the interpretation has been consistent; and (5) whether the interpretation is contrary to the clear language of the plan. See, *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1188 (8th Cir. 1989).

The record in this case is comprehensive. It establishes that under any of the tests of any of the Circuit Courts of Appeals and under the language of this Court's decision in *Firestone* and *Bowman*, the Trustees did not abuse their discretion. It was neither arbitrary nor capricious for the Trustees originally to follow the Settlors' use of an application requirement as part of the commencement date determination of the original 1963 pension benefit. It was neither arbitrary nor capricious for the Trustees to apply that interpretation uniformly from 1963 through 1974. And it was neither arbitrary nor capricious for the Trustees to incorporate the original 1963 age 62 plan as an optional benefit to be offered in addition to the pension plan benefits required by ERISA.

Review of the decision of the Court of Appeals is necessary to prevent the Ninth Circuit from overruling the deferential standard of judicial review set forth in *Firestone*.

III.

THE DECISION OF THE NINTH CIRCUIT ESTABLISHES A POLICY OF UNFETTERED DE NOVO JUDICIAL REVIEW AND REFORMATION OF PENSION PLAN STRUCTURE, LANGUAGE AND BENEFITS BEYOND THE SANCTION OF THIS COURT OR CONGRESS.

The decision of the Court of Appeals simply rewrites a thirty-three year old plan benefit to make it more remunerative for those who delayed in applying for benefits. By stating that its conclusory, purposive analysis of the Pension Plan's language complies with the judicial deference required by *Firestone* in this case, the Ninth Circuit

boldly eliminates any constraints on its authority to supervise and rewrite ERISA-regulated pension plans. This is a result not sanctioned by Congress nor by this Court. It should not be allowed to survive and replicate.

Congress and this Court have postulated that trustees and settlors of ERISA-regulated plans are intended to have the authority to make the day-to-day decisions necessary to balance the competing interests of all plan participants to a limited pool of assets. The courts in the Ninth Circuit and elsewhere are not equipped to step into the position of trustee on a case-by-case basis and rewrite the rules and benefits of the plan to suit the court's independent and personal view of what is fair and appropriate in that moment. Judicial power exercised in this fashion is power inevitably exercised without an understanding of the overall circumstances of the plan and all of its participants. It is power exercised with a bias toward the particular circumstances of the plaintiffs of the day at the expense of the rest of the participants and the plan sponsors.

The record in this case is illustrative. Over the thirty-three year history of the plan, it is true that the Trustees never acted to eliminate the application requirement to permit one who applied late to recoup monthly payments back to his 62nd birthdate. Instead, the Trustees and the plan sponsors (the Settlors) acted in innumerable other respects to improve the benefits of the plan for all participants including Respondents. The pre-ERISA plan was amended 55 times. Monthly benefit payments were systematically increased for all participants over the years from $2.67 per month per year of service to $43.12 per month per year of service – an increase in excess of

1600%. See, e.g., CR. 41, Supp. ER. 272-75 (Ex. 48). The Settlors and Trustees granted these benefit improvements to all participants, irrespective of the amount of contributions received on behalf of a particular participant. *Id.* Credit was given for years of service as far back as 1937. App. 54 (Art. 3.03(a)). However, contributions were not made by employers until 1962 and then at the initial rate of ten cents per hour. App. 52 (Art. 1.14) and 57 (Art. 3.05). Lead plaintiff Mr. Canseco's employment history reflects that contributions to the Pension Trust of totalling approximately $3,000 were made by his employers. Yet, he is receiving a monthly pension benefit of $998 per month retroactive to March 1, 1985, the date on which he reached the maximum benefit commencement date under ERISA. Obviously, the contributions paid by employers for the labors of those who came after Mr. Canseco are paying for his benefits. Overall, the record discloses that benefits promised to participants by the Trustees and Settlors have risen from nineteen million dollars in 1963 to six hundred million dollars in 1974 and to more than one billion dollars by 1985. See CR. 40, Supp. ER. 175; CR. 40, Supp. ER. 208; CR. 41, Supp. ER. 281. The record further reflects that the Trustees and Settlors have had to alter their course and adjust to changing industry conditions. Non-union employers who seldom provide comparable, if any, pension benefits to their employees have grown in number and capability. The effects of their competition for work has impaired the ability of employers contributing to the Pension Trust to continue paying in at the same rates or in the same volume of annual hours. See, e.g., CR. 78, Supp. ER. 33-36 (Kruse Dec.); CR. 81, Supp. ER. 19-23 (Bravo Dec.); CR. 41, Supp.

ER. 237-91 (Actuarial Vol. 1993). This obviously alters funding assumptions and limits the ability of the Trustees to continue making beneficial improvements to the plan. The Trustees must adapt. *Id.*

The Court of Appeals in this case never acknowledged that evidence of the foregoing balancing act was in the record before it. It didn't need to. Under the standard of review it has established in this case, if the court felt plaintiffs should not be affected by applying late, it need only interpret the plan language in a manner it finds more sympathetic. From whence the monies come to remedy this "wrong" and the nature of the impact this decision has on the benefits available to others participating in the plan is not part of the court's consideration. Under the Ninth Circuit expression of the *Firestone* standard of review, the court need never consider the original intent of the Settlors nor the history of the Trustees' interpretation, application and modification of the application component of this pre-ERISA optional benefit.

Review by this Court is urgently needed to guide the lower courts. Congress intended for ERISA to promote the establishment and maintenance of privately-administered employee benefit plans. ERISA and the predecessor common law of trusts permits the settlors and the trustees of those plans responsibly to allocate limited benefits among the competing interests of all plan participants. This interest is seriously undermined by judicial rebalancing of participant rights undertaken decades after the settlors and trustees have acted and in a case setting which focuses primarily on the interests of plaintiff participants with negligible judicial appreciation of or

consideration for the interests of all other participants to whom the trustees retain responsibilities.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Mario CANSECO; James Daniels; Manuel Delgado; Jessie Riley; Corse Whitehurst, Jr., individually and on behalf of all those similarly situated, Plaintiffs-Appellants,

v.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA; Board of Trustees of the Construction Laborers Pension Trust for Southern California, individually and in their official capacities, Defendants-Appellees.

No. 95-55011.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 11, 1996.

Decided Aug. 20, 1996.

Neal S. Dudovitz and Ruth M. Zacarias, San Fernando Valley Neighborhood Legal Services, Pacoima, California, Jeffrey Lewis, Sigman, Lewis & Feinberg, Oakland, California, for plaintiffs-appellants.

John S. Miller, Jr., Cox, Castle & Nicholson, Los Angeles, California, for defendants-appellees.

Appeal from the United States District Court for the Central District of California, Robert M. Takasugi, District Judge, Presiding. D.C. No. CV-92-00262-RMT.

Before: GOODWIN and HAWKINS, Circuit Judges, and WARE,* District Judge.

MICHAEL DALY HAWKINS, Circuit Judge:

Plaintiffs-appellants, a class of retired construction workers denied retroactive pension benefits ("Retirees"), appeal the district court's grant of summary judgment in favor of defendants-appellees, the Construction Laborers Pension Trust for Southern California ("the CLPT") and the CLPT's Board of Trustees ("Trustees"). After the Trustees refused to pay the Retirees retroactive retirement benefits based on their failure to apply for those benefits, the Retirees filed suit against the CLPT and its Trustees to recover retirement benefits dating back to the time they became eligible for those benefits. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse the district court's summary judgment order because we conclude that the CLPT pension plan entitles the Retirees to retirement benefits retroactive to the date they reached age 62 and became eligible for those benefits.[1]

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* Honorable James Ware, United States District Judge for the Northern District of California, sitting by designation.

[1] Appellees challenged the district court's subject matter jurisdiction below, and renew that challenge on appeal. This argument is without merit. The district court had jurisdiction pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(e), which grants federal district courts jurisdiction over actions by pension plan participants seeking to recover benefits or to enforce their rights under a plan. Appellees point out that 29 U.S.C. § 1144(b)(1) excludes from jurisdiction "any cause of action which arose, or any act or omission which occurred, before January 1, 1975." We have held that a cause of action for recovery of benefits accrues at the time

FACTUAL AND PROCEDURAL HISTORY

I. The class action suit against the CLPT and its trustees

Appellant and lead plaintiff Mario Canseco is 77 years old. For nearly 30 years, he worked in the construction industry in Southern California. In 1975, at age 56, Canseco became permanently disabled and was unable to continue working as a construction laborer. Although Canseco had worked in the industry for nearly 30 years, the 1975 CLPT records erroneously indicated that he had accumulated only 14 years and 10 months of service, just shy of the 15-year eligibility requirement for normal retirement benefits under the CLPT plan. When Canseco asked union officials whether he was eligible for pension benefits, they erroneously informed him that he was not eligible because he had not met the 15-year service minimum. Believing the CLPT records were accurate, and knowing his permanent disability would prevent him from earning additional years of service, Canseco did not apply for pension benefits under the CLPT plan.

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the benefits are denied. *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1501 (9th Cir.1984). In this case, the Trustees of the CLPT denied benefits well after January 1, 1975. Moreover, we have held that there is an "act or omission" within the meaning of § 1144(b)(1) where "benefits have been denied as the result of a significant act of discretion under or interpretation of [a pension] plan[.]" *Smith v. Retirement Fund Trust of the Plumbing, Heating and Piping Industry*, 857 F.2d 587, 590 (9th Cir.1988). Here, the Trustees denied benefits pursuant to their discretionary authority under the CLPT plan. Jurisdiction was therefore proper in the district court.

In 1987, however, the possibility of CLPT pension benefits suddenly materialized for Canseco. He received a notice from a federal district court in California informing him that he may be entitled to pension benefits as a result of a judgment in a class action suit against the CLPT plan. That judgment, contained in *Ponce v. Construction Laborers Pension Trust for Southern California*, 582 F.Supp. 1310 (C.D.Cal.1984), *aff'd*, 774 F.2d 1401 (9th Cir.1985), *cert. denied*, 479 U.S. 890, 107 S.Ct. 289, 93 L.Ed.2d 263 (1986), held that the CLPT's 15-year service requirement was arbitrary and capricious and constituted a structural defect in violation of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), and required the Trustees of the CLPT to lower the eligibility threshold from 15 years of service to 10 years. *Ponce*, 582 F.Supp. at 1318. *Ponce* established new eligibility rules for construction workers who had been illegally denied benefits because they had attained more than 10 years but less than 15 years of service. The notice informed Canseco that he might qualify for pension benefits because CLPT records indicated that he had attained between 10 and 15 years of service. Canseco promptly applied for pension benefits under the *Ponce* judgment.

The Trustees administering the *Ponce* judgment initially concluded, based on the CLPT's erroneous records of Canseco's service history, that he was eligible for *Ponce* benefits. However, after paying Canseco his initial benefits, the Trustees discovered that the records were erroneous, and that Canseco had actually accrued nearly 23 years of service before becoming disabled. Because Canseco had attained well over the 15 years required for eligibility, the Trustees concluded he had been eligible for

normal retirement benefits of $988 a month beginning in 1981, when he reached age 62, the minimum age required for eligibility under the CLPT plan. As noted above, however, Canseco had not applied for pension benefits when he turned 62 because he had been told – erroneously – that he failed to satisfy the service requirement for normal retirement benefits.

Although the Trustees concluded that Canseco had been eligible for normal retirement benefits beginning in January 1981, when he turned 62, they refused to pay him benefits retroactive to that date because – applying nearly perfect *Catch*-22 logic – he had failed to apply for them. Instead, the Trustees accorded Canseco benefits retroactive only to March 1, 1985, the year after he turned 65, pursuant to Section 5.04 of the CLPT plan, which provides that benefit payments "shall commence not later than" March 1 of the year following the retiree's 65th birthday. The Trustees denied Canseco retroactive benefits, however, for the period from January 1981, when he turned 62, to March 1, 1985, the year after he turned 65.[2] Canseco appealed the Trustees' decision to the CLPT's Pension Appeals Committee, but the Committee rejected his appeal in January 1989.

In January 1992, Canseco filed a class action suit in federal district court against the Trustees and the CLPT, seeking the payment of benefits retroactive to the date the class members originally became eligible for normal retirement benefits. He sought to represent all those

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[2] Canseco alleges lost retroactive benefits of $988 per month for 50 months, or $49,440, excluding interest.

CLPT plan participants who, like him, had attained eligibility for normal retirement benefits but who were accorded retroactive benefits beginning March 1 of the year after they turned 65.[3] After the Retirees and the Trustees filed cross-motions for summary judgment, the district court granted summary judgment for the Trustees as to all the Retirees' claims.

The Retirees appeal the district court's summary judgment order only as to their first three claims. The Retirees' first claim, which arises under 29 U.S.C. § 1132(a)(1)(B), is that the terms of the CLPT plan entitle them to retirement benefits retroactive to the date they became eligible for those benefits. Their second claim is that the Trustees' denial of retroactive benefits constituted a breach of their fiduciary duty under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104. Finally, their third claim is that the Trustees' denial of retroactive benefits violated ERISA's non-forfeitability provision, 29 U.S.C. § 1053.

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[3] The district court certified the following class and subclass as to certain of Canseco's claims:

(1) the class: "[a]ll persons who are, were, or will become entitled to vested pension benefits under the . . . [CLPT plan] and whose benefits entitlement date was, is or will be involuntarily set by Sections 5.03 or 5.04 of the Plan," and (2) the sub-class: "[a]ll members of the class whose pension entitlement was determined after applying for benefits under the Consent Judgment in [*Ponce*.]"

The district court reserved ruling on class certification as to the remaining claims until it had resolved the merits of those claims, which are not at issue in this appeal.

II. The CLPT plan

Several provisions of the CLPT plan are relevant to this appeal.[4] Central to the issue of eligibility for "normal" or "regular" retirement benefits is Article 2 of the plan, which describes "Eligibility for Retirement Benefits." Section 2.02 of Article 2 establishes three alternative plans under which an employee may attain eligibility for retirement on a "Regular Pension." Section 2.02 provides:

> 2.02. *Regular Pension.* An employee shall be entitled to retire on a Regular Pension under this Plan if he satisfies all of the requirements of one of the following plans[.]

Plan Two, the plan at issue in this appeal, contains three requirements for eligibility:

> A. [Employee] has completed at least 15 years of credited service[.]
>
> B. [Employee] has attained age 62.
>
> C. [Employee] has actually worked in Covered Employment for at least 700 hours following the date with respect to which contributions are first made for him.[5]

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[4] Unless otherwise noted, references are to the May 1979 CLPT plan, which was in effect at the time of the relevant actions by the CLPT Trustees. Although the CLPT plan has been amended in various respects since its enactment in 1962, it retains its original provision for a pension based on 15 years of service and attainment of age 62.

[5] In 1976, the Trustees modified the CLPT plan pursuant to ERISA requirements. They created an additional category of eligibility (now known as Plan One), providing that an employee was eligible for pension benefits after only 10 years of

Section 2.02.

Article 5 of the CLPT plan, entitled "Payment of Benefits," describes the payment of pension benefits. Section 5.01 of Article 5 provides:

> **Application**. An employee who meets the conditions for eligibility set forth herein shall, upon approval of an application submitted to the Board in a form satisfactory to the Board, become entitled to Pension Benefits under the Plan.

Two other sections of Article 5 describe the earliest and latest dates an eligible employee may begin to receive benefits. Section 5.03 establishes the earliest date an eligible employee may begin to receive payments, and provides, in relevant part:

> **Date of Commencement of Payment.**
>
> . . .
>
> Pension Benefits with respect to any eligible Employee shall, subject to approval of the Employee's application by the Board, commence as of the first day of the calendar month next following the month in which the applicant fills out and signs his pension application provided that such application is received by the Board not later than the 15th day of the month next following the month in which such pension application is filled out and signed. If not received by the 15th of the month, pension benefits shall commence as of the 1st day of the calendar month next following receipt by the

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service, and upon reaching age 65. Today, the CLPT still contains both categories of eligibility: Plan One and Plan Two.

> Board of the pension application. In any event Pension Benefits shall not commence earlier than the date of the Employee's eligibility for Pension Benefits.

Section 5.03.

Section 5.04 describes the latest date an eligible employee may begin to receive benefits, providing, in relevant part:

> **Maximum Commencement Dates.**
>
> Notwithstanding anything to the contrary contained above, and unless the Employee elects otherwise, the payment of an Employee's retirement benefit shall commence not later than March 1 of the year following the calendar year in which the latest of the following events occurs: (a) The Employee's attainment of age 65. (b) The lapse of 10 years since the Employee commenced participation in the Plan. (c) The termination of the Employee's service under this or a related Plan. (d) A date later than the latest date specified in (a), (b) or (c) if the Employee elects in writing to have payment of benefits commence on such later date.
>
> . . .

Section 5.04.

ANALYSIS

The Retirees' first claim arises under the Employee Retirement Income Security Act ("ERISA"), which authorizes participants and beneficiaries of a pension plan to bring suit to recover the benefits to which they are entitled under the terms of that plan. 29 U.S.C.

§ 1132(a)(1)(B).[6] The Retirees allege that the CLPT plan entitles them, retroactively, to pension benefits for which they were eligible at age 62, but for which they failed to apply. They seek pension benefits retroactive to the date they reached age 62 and attained eligibility. The Retirees dispute the Trustees' interpretation of the CLPT plan, which states, first, that an application is a prerequisite for the receipt of benefits, and, second, that the plan does not permit retroactive payments. The district court held that the Trustees' interpretation did not "clearly conflict with the plain language of the plan" and therefore was not "arbitrary and capricious." Because we conclude reversal of the district court's summary judgment order is warranted on the basis of the Retirees' first claim, we need not reach their other two claims.

In actions under 29 U.S.C. § 1132(a)(1)(B) to challenge the denial of benefits based on a plan administrator's interpretation of a plan, the district court must review for abuse of discretion the benefits decisions of plan administrators and other fiduciaries to whom the plan grants "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956-57, 103 L.Ed.2d 80 (1989). *Accord Winters v. Costco Wholesale Corp.*, 49 F.3d 550, 552 (9th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 276, 133 L.Ed.2d 197 (1995). In this

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[6] 29 U.S.C. § 1132(a)(1)(B) allows a cause of action "to recover benefits due to [a plan participant or beneficiary] under the terms of [the] plan, to enforce [the claimant's] rights under the terms of the plan, or to clarify [the claimant's] rights to future benefits under the terms of the plan[.]"

case, the trust agreement establishing the CLPT plan grants the Trustees discretion to construe the terms of the CLPT plan because it provides that the Trustees "shall have the power to administer the [CLPT] Fund[,]" including the power "to construe the provisions of . . . the [CLPT] Plan[,]" and that "any such construction adopted by the Board in good faith shall be binding upon any and all parties or persons affected thereby." We have construed comparable language in other plan provisions to confer interpretive discretion. *See Eley v. Boeing Co.*, 945 F.2d 276, 278 (9th Cir.1991) (describing similar plan provisions).

We review de novo the district court's application of the abuse of discretion standard. *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469, 1471 (9th Cir.1993). We have equated the abuse of discretion standard with "arbitrary and capricious" review. *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1524 (9th Cir.1993).

Although ERISA creates a cause of action for plan participants and beneficiaries to enforce their rights under a plan, *see* 29 U.S.C. § 1132(a)(1)(B), the statute itself does not resolve many of the issues raised by such claims. Instead, federal courts have developed a "federal common law of rights and obligations under ERISA-regulated plans."[7] *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56,

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[7] The legislative history of ERISA indicates that Congress contemplated that federal courts adjudicating claims for denial of pension benefits would develop federal common law principles to govern those claims.

The ERISA Conference Report states that suits to enforce the terms of individual plans "are to be regarded as arising

107 S.Ct. 1549, 1558, 95 L.Ed.2d 39 (1987) (discussing obligation of courts to develop federal common law of ERISA); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499-1500 (9th Cir.1984). In the course of developing a "federal common law . . . [of] ERISA-regulated plans[,]" federal courts have articulated several principles that bear on the resolution of the Retirees' claim.

I. Interpretive principles in the federal common law of ERISA

A. The plain language of the plan

A key principle guiding our resolution of the Retirees' claim is that we must look to the plain language of the CLPT plan to determine whether the Trustees' interpretation of that plan is "arbitrary and capricious." We have consistently explained that "trustees abuse their discretion if they . . . construe provisions of [a] plan in a way that clearly conflicts with the plain language of the plan." *Johnson v. Trustees of the Western Conf. of Teamsters Pension Trust Fund*, 879 F.2d 651, 654 (9th Cir.1989) (citation omitted); *accord Saffle v. Sierra Pacific Power Co.*, 85 F.3d 455 (9th Cir.1996); *Eley*, 945 F.2d at 279 (citing *Johnson*, 879 F.2d at 654); *see also Menhorn*, 738 F.2d at 1500, n.

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under the laws of the United States in similar fashion to those brought under Section 301 of the Labor Management Relations Act." H.R.Conf.Rep. No. 1280, 93d Cong., 2d Sess. 327, 3 ERISA Legislative History 4594. Additionally, Sen. Javits explained in a floor statement that Congress "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension funds." 3 ERISA Legislative History 4771.

2 ("[a]ctions to recover benefits or enforce rights under the terms of a plan will typically involve the application of [ ] general principles of contract law[.]"). The question we must ask in resolving this dispute is not "whose interpretation of the plan documents is most persuasive, but whether the [Trustees'] interpretation is unreasonable." *Winters*, 49 F.3d at 553 (citation omitted).

To determine whether the Retirees are entitled to retroactive retirement benefits despite their failure to apply for benefits, we look to the CLPT plan provisions governing benefit eligibility and benefit payments. We start with Article II, which governs "Eligibility for Retirement Benefits." Section 2.02 of Article 2 provides that an employee "*shall be entitled* to retire on a Regular Pension under this Plan *if he satisfies all of the requirements of one of the following plans* [.]" Section 2.02 (emphasis added). It then enumerates three requirements for eligibility under Plan Two: (1) 15 years of service, (2) attainment of age 62, and (3) 700 "covered hours" of employment. By its mandatory language ("shall be entitled"), Section 2.02 provides that these three criteria – years of service, age, and covered hours – are the sole and exclusive requirements for eligibility under the CLPT plan. Section 2.02 thus does not require an application for benefits as a condition of eligibility. Instead, Section 2.02 confers eligibility on an employee once he has satisfied the three conditions listed in Plan Two. In plain and absolute terms, Section 2.02 provides that an employee who satisfies all three requirements "*shall be entitled* to retire on a Regular Pension." (emphasis added). Section 2.02 thus guarantees normal retirement benefits to eligible employees.

Sections 5.01 and 5.03 reinforce our conclusion that an application is not a condition of eligibility under the CLPT plan. First, although Section 5.01 requires an eligible employee to submit an application to begin receiving benefit payments, it does not require an application as a condition of eligibility. On the contrary, Section 5.01 refers to employees who *already* "meet[ ] the conditions of eligibility[,]" and provides that such employees "shall, upon approval of an application . . . become entitled to [p]ension [b]enefits[.]" By referring to eligible employees, Section 5.01 clearly contemplates that an employee will already have satisfied the conditions of eligibility before applying for payments to begin. Section 5.01 thus suggests that eligibility is defined elsewhere in the CLPT plan, and does not depend on the submission of an application.

Second, Section 5.03 describes the earliest date payments may commence for an "eligible [e]mployee[:]" generally the first day of the month after the employee fills out and signs an application, but "[i]n any event," no earlier than "the date of the Employee's eligibility for Pension Benefits." Section 5.03. Section 5.03's reference to "the date of [an] [e]mployee's eligibility" suggests that the date of eligibility is wholly independent from the date of application. Indeed, as noted above, Section 2.02 establishes that the date of eligibility is the first date all of the following are true: (1) the employee has completed 15 years of service, (2) the employee has reached age 62, and (3) the employee has worked 700 covered hours. The date an employee applies for benefits thus has no bearing on the date that employee becomes eligible for retirement benefits.

Finally, the structure of the CLPT plan reinforces our conclusion that the plan does not require an application as a condition of eligibility. Article 2 and Article 5 cover separate provisions of the plan: Article 2 governs "Eligibility for Retirement Benefits," while Article 5 governs "Payment of Benefits." The separation of these provisions into different articles of the CLPT plan indicates that *eligibility* for retirement benefits is wholly independent from the *payment* of those benefits.

We are not persuaded by the Trustees' assertion that the CLPT plan bars the retroactive payment of retirement benefits to an employee who is eligible for those benefits. Nowhere does the CLPT plan provide that an employee's failure to submit an application for benefits will result in the retroactive loss of benefits for which that employee is eligible. Although an application is required to initiate *payment* of benefits, it does not follow from this procedural requirement that the failure to apply for payment of benefits entails the complete loss of those benefits retroactively. On the contrary, the plain terms of Section 2.02 mandate that an eligible employee *"shall be entitled* to retire on a Regular Pension under this Plan *if he satisfies all of the requirements* of one of the following plans[.]" Section 2.02 (emphasis added). This mandatory language guarantees retirement benefits to employees who have met the three requirements of eligibility: service, age, and covered hours. An employee's failure to apply for retirement benefits cannot destroy that employee's eligibility.

The Trustees construe Sections 5.01 and 5.04 to prohibit the payment of retroactive benefits. The Trustees' interpretation of these sections is not reasonable, however, since it places Sections 5.01 and 5.04 in conflict with

the mandatory language of Section 2.02. Section 5.01 simply requires an employee to comply with an administrative formality – the submission of an application – in order to begin receiving payments. This procedural requirement does not prohibit the retroactive payment of benefits, however. Section 5.04 provides that the payment of benefits "shall commence" not later than March 1 of the year following the employee's 65th birthday. This section simply identifies the latest date the CLPT plan must begin disbursing benefits to an eligible employee, but it does not prevent the pension plan from disbursing retroactive benefits. As we explained above, Section 2.02, by its mandatory language, guarantees normal retirement benefits to eligible employees. The payment of benefits retroactive to the date of eligibility is necessary to preserve Section 2.02's guarantee. By construing the CLPT plan to preclude the retroactive payment of benefits to eligible employees, the Trustees strip Section 2.02 of its meaning. Such an interpretation is arbitrary and capricious.

Confronted with a similar interpretive issue, the Fourth Circuit held that a pension plan administrator could not deny an eligible plan participant retroactive benefits on the basis of that participant's failure to timely apply for those benefits. *Cotter v. Eastern Conf. of Teamsters Retirement Plan,* 898 F.2d 424 (4th Cir.1990). The facts of *Cotter* are strikingly similar to the facts of this case. The plaintiff in *Cotter,* like the Retirees in this case, failed to claim retirement benefits at the time he became eligible for them because he believed, erroneously, that he was ineligible for benefits. Cotter was employed for 20 years by the Eastern Conference of Teamsters, then retired from

the Eastern Conference to work for the International Brotherhood of Teamsters. At the time he retired from the Eastern Conference and began working for the International, Cotter was in fact eligible for retirement benefits under the Eastern Conference's pension plan. However, he did not file a claim for benefits until eight years after attaining eligibility because he believed he would not be eligible for benefits until he also retired from the International. When Cotter subsequently learned that under the pension plan, he could have received retirement benefits from the Eastern Conference during his tenure at the International, he applied for benefits retroactive to the date he attained eligibility. Because Cotter had failed to file a claim for benefits at the time he became eligible for them, however, the plan administrator refused to pay him retroactive benefits, insisting that the plan's terms required an application as a prerequisite to the receipt of benefits. Like the Retirees in this case, Cotter sued his pension plan under 29 U.S.C. § 1132(a)(1)(B), claiming that the terms of the plan entitled him to retroactive benefits and that the plan administrator had violated his fiduciary duty by denying the claim.

The Fourth Circuit in *Cotter* concluded that the plan administrator abused his discretion in denying Cotter retirement benefits retroactive to the time he became eligible for them. A key part of the court's reasoning was that the plan administrator's interpretation of the plan was unreasonable because it contravened the terms of the plan. It concluded that the plan's requirement that a participant file a claim to receive benefits was merely

administrative and did not prevent the award of retroactive benefits for which the participant had attained eligibility. *Cotter,* 898 F.2d at 428.

The Trustees insist *Cotter* is distinguishable because it involved different plan language. We disagree. Although the wording of the two plans is different, the *Cotter* court relied chiefly on the structure of the plan, which resembles the structure of the CLPT plan. Like the application requirement in *Cotter,* the application requirement in the CLPT plan is contained in a portion of the plan governing the mere administration of benefits, rather than the requirements of eligibility. *Id.* To the extent that the structure of the two plans is similar, *Cotter* is instructive and reinforces our conclusion that the application requirement is merely administrative.

B. The disfavoring of implied additional terms

A second interpretive principle guiding our analysis is that pension plan trustees or administrators may not construe a plan so as to impose an additional requirement for eligibility that clashes with the terms of the plan. Lower federal courts have held that where plan trustees "impose a standard [of eligibility for pension plan benefits] not required by the pension plan itself," that action " 'result[s] in an unwarranted and arbitrary construction of the [p]lan.' " *Morgan v. Mullins,* 643 F.2d 1320, 1321 (8th Cir.1981) (quoting *Maness v. Williams,* 513 F.2d 1264, 1267 (8th Cir.1975)).

We have applied this principle in the context of severance benefits and disability benefits. In *Blau v. Del*

Monte Corp., 748 F.2d 1348 (9th Cir.), *cert. denied*, 474 U.S. 865, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985), an employer denied severance benefits to several employees. The terms of the severance plan provided for severance pay when "jobs [were] 'eliminated' and 'alternative employment opportunities [were] unavailable within the [employer corporation].' " *Blau*, 748 F.2d at 1354. The employer denied severance benefits, however, because it insisted that the employees additionally needed to show that several other conditions were met, including that there were no positions available outside the corporation, *Id.* at 1354-55, and that the employees subsequently remained unemployed. *Id.* at 1355. We concluded that the employer in *Blau* was attempting to impose additional conditions of eligibility above and beyond those required by the terms of the plan, and we refused "to imply other conditions into the plan[.]" As we explained in *Blau:* "Imposition of conditions outside the plan amounts to arbitrary and capricious conduct[.]" *Id.* at 1356.

Recently, in *Saffle*, we extended this principle to disability benefits. In *Saffle*, a plan administrator denied an employee long-term benefits for "total disability." The administrator concluded that the employee did not satisfy the definition of "total disability" because medical reports concluded the employee could return to work if her job was modified to allow her to perform exclusively sedentary work. On appeal, we rejected the administrator's interpretation of the disability plan in part because the administrator construed the plan to prohibit benefits if the employee was able to continue working with "accommodations." Such an interpretation, we concluded, would operate to "impose[ ] a new requirement

for coverage": it would require the claimant to show that accommodations were futile. We rejected this implied additional term, explaining that a "[plan] administrator lacks discretion to rewrite the [p]lan." *Saffle*, 85 F.3d at 459-60 (citations omitted).

Applying this principle here, we conclude that the Trustees worked a similar abuse of discretion in interpreting the CLPT plan's application requirement as a prohibition on the payment of retroactive retirement benefits. By retroactively denying benefits to a class of workers who have indisputably earned them, the Trustees have, in effect, imposed on those workers an additional requirement of eligibility: the submission of an application for benefits. We reject such an additional requirement as inconsistent with the terms of the CLPT plan, since nothing in the CLPT plan makes an application a prerequisite for eligibility.

Based on the plain language of the CLPT plan, we conclude that the submission of an application is *not* a condition of eligibility but is merely an administrative procedure that triggers the commencement of benefit payments. As such, the application requirement cannot override the CLPT plan's mandate that an employee who "satisfies all of the requirements" of eligibility "shall be entitled to retire on a Regular Pension under this Plan[.]" Section 2.02. Although an application is required for payments to begin, this administrative requirement does not operate to strip eligible retirees of the benefits they earned upon satisfying the three requirements of Plan Two. In construing the CLPT plan to prohibit the retroactive payment of benefits for which the Retirees are indisputably eligible, the Trustees offered an interpretation of

the CLPT plan that clearly conflicted with its plain language.

Remand to the plan administrator is appropriate where that administrator has "construe[d] a plan provision erroneously" and therefore has "not yet had the opportunity of applying the [p]lan, properly construed, to [a claimant's] application for benefits." *Id.* at 461. On the facts of this case, however, we conclude that remand is inappropriate. Although the Trustees misconstrued the terms of the CLPT plan, remand is not necessary because "reevaluation of the merits of [the Retirees'] claim" is not required here. *Cf. Id.* Unlike cases wherein we have remanded to the plan administrator, no factual determinations remain to be made in this case. *Cf. Id.* (remanding to the plan administrator for application of correct standard for determining whether claimant had "total disability" for purposes of disability benefits); *Patterson v. Hughes Aircraft Co.*, 11 F.3d 948, 951 (9th Cir.1993) (remanding to plan administrator for factual determination as to cause of claimant's disability); and *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 944 (9th Cir.1995) (remanding for reevaluation of evidence in light of new medical standard).

II. Attorneys' Fees

The Retirees seek attorneys' fees under 29 U.S.C. § 1132(g)(1) for their attorneys' work on this appeal. 29 U.S.C. § 1132(g)(1) authorizes an award of "reasonable attorney[s'] fee[s] and costs" in an ERISA action under 29 U.S.C. § 1132(a)(1)(B). We have construed this provision to include attorneys' fees and costs on appeal. *Smith v.*

Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California, 857 F.2d 587, 592 (9th Cir.1988).

The award of attorneys' fees is discretionary based on consideration of the following factors, among others: (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees against the opposing party would deter others from acting under similar circumstances; (4) whether the party requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. *Smith*, 857 F.2d at 592. Ordinarily, if a plan participant or beneficiary prevails in an action to enforce his rights under the plan, recovery of attorneys' fees is appropriate, absent special circumstances making an award unjust. *Id.* Because the Retirees have prevailed in their appeal, and no special circumstances would make the award of fees unjust, we grant the Retirees' request for attorneys' fees.

CONCLUSION

We conclude that the CLPT plan entitles the Retirees to retirement benefits retroactive to the date they became eligible for those retirement benefits. We therefore reverse the district court's summary judgment order and remand with instructions to enter judgment in favor of the Retirees.

We grant the Retirees' request for attorneys' fees and costs on appeal and refer the setting of the amount to the appellate commissioner.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 95-55011
CT/AG#: CV-92-00262-RMT

MARIO CANSECO; JAMES DANIELS;
MANUEL DELGADO; JESSIE RILEY;
CORSE WHITEHURST, JR., individually
and on behalf of all those similarly situated

Plaintiffs - Appellants

v.

CONSTRUCTION LABORERS PENSION TRUST
FOR SOUTHERN CALIFORNIA; BOARD OF TRUSTEES
OF THE CONSTRUCTION LABORERS PENSION TRUST
FOR SOUTHERN CALIFORNIA, individually and
in their official capacities

Defendants-Appellees

(Filed Oct. 28, 1996)

APPEAL FROM the United States District Court for Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this cause be, and hereby is REVERSED and REMANDED. Costs taxed.

Filed and entered August 20, 1996.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIO CANSECO; JAMES DANIELS; MANUEL DELGADO; JESSIE RILEY; CORSE WHITEHURST, JR., individually and on behalf of all those similarly situated Plaintiffs - Appellants v. CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA; BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, individually and in their official capacities Defendants-Appellees	No. 95-55011 D.C. No. CV-92-00262-RMT (Central California) ORDER (Filed Oct. 9, 1996)

Before: GOODWIN and HAWKINS, Circuit Judges, and WARE,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

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* Honorable James Ware, United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARIO CANCECO, JAMES DANIELS, MANUEL DELGADO, JESSIE RILEY, CORSE WHITEHOURST, JR., individually and on behalf of all those similarly situated Plaintiffs, vs. CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA; and BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, individually and in their official capacity Defendants	CASE NO. CV 92-0262-RMT FINDINGS OF FACT AND CONCLUSIONS OF LAW RE MOTIONS FOR SUMMARY JUDGMENT (Filed Nov. 30, 1994)

This matter having come before the court on the motion by plaintiffs MARIO CANSECO, JAMES DANIELS, MANUEL DELGADO, JESSIE RILEY, and CORSE WHITEHURST, Jr., individually and on behalf of all those similarly situated, for summary judgment; and on the cross motion by defendants CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, and THE BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA for summary judgment, and the court having considered the pleadings and other documents filed herein, the court now issues these findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Construction Laborers Pension Trust for Southern California ("CLPT") is a collectively-bargained multi-employer pension plan established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186(c)(5).

2. The CLPT was established in 1962 pursuant to a written Agreement and Declaration of Trust ("Trust Agreement") between the Southern California District Council of Laborers and its affiliated local unions (the "Union"), several employers' associations, and the initial Trustees.

3. The CLPT was created in connection with the collective bargaining negotiations between the Union and employers associations for the 1962 Master Labor Agreement, and is governed by a Board of Trustees, half of whom are appointed by the Union, and half of whom are appointed by the employers' associations.

4. Pursuant to the Trust Agreement, the Board of Trustees adopted a written pension plan ("Pension Plan") which has been amended from time to time; the Pension Plan sets forth eligibility criteria and other rules for the payment of benefits.

5. At all times relevant hereto, the Trust Agreement has given the Board of Trustees the power to administer, construe and interpret the Pension Plan, subject to limitations imposed by the Master Labor Agreements.

6. Article I, Section 1.20, Normal-Retirement Age, provides: "[t]he term 'Normal Retirement Age' as the term is

used in ERISA, means age 65, or the age on the 10th anniversary of the employee's commencement of the participation in the Plan, whichever is later."

7. Article II, Section 2.02, Regular Pension, provides in relevant part:

> An employee shall be entitled to retire on a Regular Pension under the Plan if he satisfies all of the requirements of one of the following Plans:
>
> PLAN TWO
>
> A. He has compieted at least 15 years of credited service as determined in accordance with Article IV.
>
> B. He has attained age 62.
>
> C. He has actually worked in Covered Employment for at least 700 hours following the date with respect to which contributions are first made for him.

8. Article V, Section 5.01, Application, provides:

> An employee who meets the conditions for eligibility set forth herein shall, upon approval of an application submitted to the Board in a form satisfactory to the Board, become entitled to pension benefits under the Plan.

9. Article V. Section 5.02, Recovery of Overpayment and Effect of False Statements or Knowing Omissions, as amended December 11, 1984, provides in relevant part:

> Any person who accepts benefits under the Plan. should make certain that he accepts only the amount of benefits to which he is entitled under the plan. If an overpayment is made under the Plan to an Employee or Employee retired under the Plan or to any other person, the board shall be

entitled to recoup, offset or recover the amount of any payment in excess of the amount to which such Employee or Employee retired under the Plan or other person was entitled.

10. Article V, Section 5.03, Date of Commencement of Payment, provides in relevant part:

> Pension benefits with respect to any eligible Employee shall, subject to approval of the Employee's application by the Board, commence as of the first day of the calendar month next following the month in which the applicant fills out and signs his pension application provided that such application is received by the Board not later than the 15th day of the month next following the month in which such pension application is filled out and signed. If not received by the 15th of the month, pension benefits shall commence as of the 1st day of the calendar month next following receipt by the Board of the pension application. In any event Pension Benefits shall not commence earlier than the date of the Employee's eligibility for Pension Benefits.

11. Article V, Section 5.04, Maximum Commencement Dates, provides in relevant part:

> Notwithstanding anything to the contrary contained above, and unless the Employee elects otherwise, the payment of an Employee's retirement benefit shall commence not later than March 1 of the year following the calendar year in which the latest of the following events occurs: (a) the Employee's attainment of age 65. (b) the lapse of 10 years since the Employee commenced participation in the Plan. (c) The termination of the Employee's service under this or a related plan. (d) A date later than the latest date specified in (a)(b) or (c) if the

Employee elects in writing to have payment of benefits commence on such later date.

12. Plaintiffs are a class of retired and disabled construction laborers "who are, were, or will become entitled to vested pension benefits under the . . . [CLPT] and whose benefits entitlement date was, is or will be involuntarily set by Sections 5.03 or 5.04 of the Plan," and a sub-class of those class members "whose entitlement to benefits was determined after applying for benefits under the Consent Judgment in *Ponce and Harrison v. Construction Laborers Pension Trust for Southern California*, Nos. 76-2056 and 81-0591 (C.D. Cal.)."

13. Defendants have refused to pay plaintiffs benefits retroactive to age 62.

14. The parties have filed cross-motions for summary judgment as to all claims.

15. Defendants argue that this court lacks subject matter jurisdiction because the pension plan at issue was created in 1963, prior to ERISA's effective date of January 1, 1975, as set forth at 29 U.S.C. § 1144(b)(1).

16. Plaintiffs' benefits were denied after the effective date of ERISA.

17. Defendants contend that the Pension Plan never offered benefits beginning at age 62. Rather, they assert that the Pension Plan has always provided an age 62, 15-year pension benefit which begins monthly payments prospectively on the month following the date of the application, provided that the date is not earlier than when the employee attains age 62; but that in no event are retroactive payments provided. Defendants further claim that the age 62, 15-year

pension is an optional or excess retirement plan that is treated differently from the age 65, 10-year ERISA required plan, and is currently outside the protection of Section 203 of ERISA, 29 U.S.C. § 1053.

18. The circumstances of Mario Canseco, the lead plaintiff, are typical of what happened to each class member.

19. Canseco became disabled and ceased working in 1975 at the age of 56.

20. In 1975, the Union and Canseco's attorney both informed him that he did not qualify for a pension because he only had 14 and 10/12 years credit, less than the 15 years required.

21. In 1987, Canseco received a notice from this court advising him that he might be entitled to a pension benefit through the Ponce/Harrison Judgment By Consent. The notice explained that if Canseco had earned between 10 and 15 years of pension credit from the CLPT before 1976, he would be entitled to pension benefits because the court order lowered the vesting threshold from 15 years to 10 years.

22. Since Canseco had previously been informed that he had 14 10/12 years of credit, Canseco followed the instructions in the court notice and applied for a Ponce benefit; shortly thereafter he began receiving monthly pension benefits.

23. Upon further review of Canseco's application, the CLPT determined that its original records were in error and that as of 1975, Canseco actually had 22 11/12 years of credit.

24. In June 1988, the CLPT found that Canseco was vested when he ceased work in 1975 and could have

received a full, unreduced normal retirement benefit beginning in January 1981 when he turned 62.

25. Although the CLPT commenced payment of Canseco's monthly pension benefits in 1988, it also denied Canseco's request for benefits retroactive to age 62 – the date his benefits could have commenced had he timely applied therefor.

26. Instead, the Trustees determined that Articles 5.03 and 5.04 of the CLPT Plan limited Canseco to receiving retroactive benefits back to March 1 of the year after he turned 65, thus denying him approximately three years of pension benefits.

27. Article 5.04 mandates that vested participants begin receiving their benefits no later than March 1 of the year after the participant reaches age 65.

28. There is no dispute as to the work performed by the plaintiffs, the amount of pension credit they earned, or that at age 62, plaintiffs were eligible to receive full benefits.

29. The primary issue in dispute is whether the Pension Plan, as interpreted by the Trustees, permitted the Trustees to limit the payment of retroactive benefits for all of the plaintiffs to March 1 of the year after they became 65, thereby denying benefits retroactive to age 62.

30. In plaintiffs' first claim, they assert that, pursuant to section 2.02 of the CLPT, the plain language of Plan II entitles them to receive full, vested benefits from age 62 without limitation on retroactivity that results from the failure to submit an application for the benefits.

31. Defendants respond that the plain language of CLPT sections 5.01 and 5.03 expressly require an application

prior to the receipt of benefits and that the CLPT has no provision for retroactive benefits.

32. Plaintiffs' second claim alleges that defendants breached their fiduciary duties to plaintiffs by denying payment of vested benefits from the date each plaintiff reached age 62.

33. Defendants do not believe that they breached their fiduciary duties and argue that plaintiffs' second claim is largely based on plaintiffs' first and third claims and that resolution of those claims will dictate the resolution of the second claim.

34. Plaintiffs' third claim alleges that defendants' failure to pay retroactive benefits from age 62 until March 1st of their 65th year is a forfeiture of vested benefits in violation of ERISA.

35. Defendants respond that the Plan II Pension is an optional pension benefit in excess of ERISA requirements and, as such, may properly contain a commencement of benefit provision that begins with the date of application without violating ERISA's vesting and nonforfeitability provisions.

36. Plaintiffs' fourth claim alleges that the failure to pay benefits retroactive to age 62 was an assignment of benefits prohibited by ERISA.

37. Defendants respond that since no retroactive benefits were owed, there was no benefit that could be improperly assigned.

38. Plaintiffs, fifth claim[1], brought on behalf of the subclass, alleges that plaintiffs failed to file applications for benefits at age 62 based on misrepresentations of defendants that plaintiffs were not eligible for benefits at that time and, therefore, defendants should be equitably estopped from denying plaintiffs retroactive benefits to age 62.

39. Defendants respond that equitable estoppel will not lie to force an ERISA pension plan to pay benefits which are not consistent with the terms of the Pension Plan.

40. Plaintiffs' sixth claim on behalf of the sub-class alleges that defendants' failure to pay benefits retroactive to age 62 is a breach of defendants' fiduciary duties under ERISA; these allegations are substantially identical to those made in plaintiffs' second claim.

41. Defendants respond that no breach of fiduciary duties occurred and the determination of plaintiffs' second claim will dictate the determination of the sixth claim.

42. Plaintiffs eighth claim is made solely on behalf of plaintiff Canseco to prohibit the defendants from seeking to recover overpayment of benefits to Canseco.

43. In 1987, pursuant to the *Ponce/Harrison* judgment, Canseco filed an application to receive pension benefits. Canseco received a lump sum amount of $44,944.78 as payment for past benefits due, and began receiving monthly benefit payments of $489.50.

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[1] Subsequent to the filing of the motions for summary judgment, this court's order of July 26, 1994, denied certification of the sub-class as to plaintiffs' fifth claim and dismissed the seventh claim, both without prejudice.

44. Subsequently, CLPT determined that it had miscalculated Canseco's service credits and that instead of qualifying for Ponce benefits, Canseco qualified for a Pension Plan II benefit.

45. In January 1989, CLPT began paying Canseco increased monthly benefits under Pension Plan II.

46. The effect of the change to Pension Plan II benefits was that the amount of Canseco's monthly benefit went up from $489.50 to $988.17 per month, which meant that CLPT had underpaid Canseco for the period March 1, 1985, through December 31, 1988. Also, Canseco's effective date for benefits changed from February 1, 1976, to March 1, 1985, which meant that CLPT had overpaid Canseco in *Ponce* benefits.

47. Defendants assert, and Canseco does not dispute, that the net result of these changes was that Canseco was overpaid $1,936.46.

48. Canseco asserts that ERISA prohibits defendants from recovering the overpayment.

49. Defendants respond that ERISA does not prohibit the recovery of overpaid benefits and that they are entitled to deduct the overpayment from future benefit payments.

Any finding of fact which may be deemed a conclusion of law is hereby incorporated into the Conclusions of Law below, and any conclusion of law which may be deemed a finding of fact is hereby incorporated into the Findings of Fact above.

CONCLUSIONS OF LAW

1. Under Rule 56, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

2. [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial.

Id.

3. Regarding defendants' challenge of this court's subject matter jurisdiction, 29 U.S.C. § 1144(b) (1) states: "[t]his section shall not apply with respect to any cause of action which arose, or any act or omission that occurred, before January 1, 1975."

4. "In this circuit the 'cause of action' and 'act of omission' clauses of 29 U.S.C. § 1144(b) (1) are construed as creating two separate requirements." *Smith v. Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California*, 857 F.2d 587, 590 (9th Cir. 1988).

5. "[A]n ERISA cause of action based on a denial of benefits accrues at the time the benefits are denied." *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1501 (9th Cir. 1984).

6. The 9th Circuit has stated the standard for applying the act or omission clause of 29 U.S.C. § 1144(b) (1):

> In cases where a claimant is formally denied benefits after ERISA's effective date pursuant to an unambiguous and nondiscretionary plan provision adopted before the effective date, the denial is not reviewable under ERISA. . . . The result is the same where a post-effective date formal denial is the inevitable result of unequivocal pre-effective date interpretations of or exercises of discretion under the plan. . . . [Such] cases . . . must be distinguished from those in which benefits have been denied as the result of a significant act of discretion under or interpretation of the plan which took place after ERISA's effective date.

Smith v. Retirement Fund Trust, 857 F.2d at 590 (citing *Menhorn v. Firestone*, 738 F.2d at 1501-02).

7. The "cause of action" requirement of 29 U.S.C. § 1144(b)(1) is satisfied because the cause of action in the present case accrued post-ERISA when defendants denied plaintiffs' requests for retroactive benefits to age 62 in 1988.

8. The "act or omission" requirement is also satisfied because it is the Trustees' post-ERISA interpretation of the Pension Plan's application requirement that the plaintiffs now contest.

9. The Pension Plan provisions at issue are not "unambiguous" and nondiscretionary. While it is clear that benefits will not be paid until an application is submitted, it is not "unambiguous" that the application requirement will affect the amount of benefits the applicant will receive; this determination was made by the Trustees in their exercise of discretion.

10. Further, the denial of retroactive benefits is unequivocally the result of post-effective date interpretations of Section 5.03 since plaintiffs didn't request the benefits until well after January 1, 1975.

11. Contrary to defendants' belief, enactment of a pension plan provision prior to ERISA's effective date does not automatically deprive this court of jurisdiction. *See Menhorn*, 738 F.2d at 1496 (citing *Paris v. Profit Sharing Plan*, 637 F.2d 357, 360-61 (5th Cir. 1981)(ERISA held to govern post-effective date denial of benefits under plan adopted before effective date, because relevant provision so ambiguous that its application was event most essential to plaintiff's claim)).

12. This court has subject matter jurisdiction over this action pursuant to 29 U.S.C. § 1132(e) because the cause of action accrued, and the act or omission of the Trustees occurred, after the effective date of ERISA.

13. As both parties acknowledge, since the Trust Agreement provides the Trustees with the discretionary authority to determine eligibility for benefits and to construe the terms of the Pension Plan, the standard of review of the Trustees' actions is "abuse of discretion." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Jones v. Laborers Health & Welfare Trust Fund*, 906 F.2d 480 (9th Cir. 1990).

14. The 9th Circuit has decided that when a pension plan gives such discretion to the trustees, the arbitrary and capricious standard applies to the discretionary actions of the trustees. *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1524 (9th Cir. 1993); *Dytrt v. Mountain State Telephone & Telegraph Co.*, 921 F.2d 889, 894 (9th Cir. 1990).

15. "Trustees abuse their discretion if they render decisions without any explanation, or construe provisions of the plan in a way that clearly conflicts with the plain language of the plan." *Eley v. Boeing Co.*, 945 F.2d 276, 279 (9th Cir. 1991)(citing *Johnson v. Trustees of the Western Conference of Teamsters Pension Trust Fund*, 879 F.2d 651, 654 (9th Cir. 1989)).

16. Because the Board of Trustees consists of both management and union employees, plaintiffs have offered insufficient evidence to support their contention that the defendants have a "personal interest" or conflict of interest that would justify a less deferential review. *See Eley*, 945 F.2d at 279; *Jones*, 906 F.2d at 481 (When an administrator is acting under a conflict of interest, that conflict must be considered in the abuse of discretion determination).

17. Analysis of a pension plan section begins with its plain language because the best indication of what words mean is what they say. *McDaniel v. National Shopmen Pension Fund*, 817 F.2d 1370, 1373 (9th Cir. 1987), *cert. denied*, 494 U.S. 1092 (1990).

18. Article V, Section 5.01 expressly states: "[a]n employee who meets the conditions for eligibility set forth herein shall, *upon approval of an application* submitted to the Board in a form satisfactory to the Board, become entitled to Pension Benefits under the Plan." (emphasis added).

19. Article V, Section 5.03 once again indicates that pension benefits will commence " . . . as of the first day of the calendar month next following the month in which *the applicant fills out and signs his pension application. . . .* " (emphasis added).

20. In light of this plain language, defendants' interpretation of these provisions to require an application before the employee becomes entitled to pension benefits does not clearly conflict with the plain language of the plan and is not arbitrary and capricious; therefore, defendants are entitled to summary judgment on plaintiffs' first claim for rights to benefits under the terms of the plan.

21. In light of this court's determination of plaintiffs' first claim, *supra*, and third claim, *infra*, Defendants are entitled to summary judgment on plaintiffs' second claim for breach of fiduciary duties because defendants' have discharged their duties in a manner that does not clearly conflict with the plain language of the Plan.

22. ERISA provides in relevant part that " . . . an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . . . " 29 U.S.C. § 1053(a).

23. "Nonforfeitable" is defined in relevant part at 29 U.S.C. § 1002(19):

> The term nonforfeitable when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

(emphasis added).

24. "Normal Retirement Age" is defined at 29 U.S.C. § 1002(24):

> The term "normal retirement age" means the earlier of:

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of –

(i) the time a plan participant attains the age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

25. ERISA's anti-forfeiture provision, 29 U.S.C. § 1053(a), does not prohibit forfeiture of benefits in excess of ERISA requirements. *Lojeck v. Thomas*, 716 F.2d 675 (9th Cir. 1983); *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980).

26. "The 'normal retirement age' provided by a pension plan controls the issue as to the date upon which a participant's pension rights become nonforfeitable under ERISA, provided the normal retirement age so provided meets ERISA's minimum requirements." *Johnson v. Franco*, 727 F.2d 442, 445 (5th Cir. 1984); *see also Hernandez v. Southern Nevada Culinary and Bartenders*, 662 F.2d 617, 619-20 (9th Cir. 1981)("ERISA gives an employee-participant no vested right to receive pension benefits until he reaches normal retirement age").

27. Pension Plan Article I, Section 1.20 expressly provides that age 65 is the normal retirement age under the Plan and, therefore, complies with ERISA and controls for the issue as to the date upon which pension rights become nonforfeitable.

28. Plan II benefits payable at age 62 are in excess of ERISA requirements and are not subject to the nonforfeiture provision of ERISA as set forth at 29 U.S.C. § 1053, and, as

such, conditioning receipt of benefits at age 62 on the filing of an application by the employee is permissible.

29. Therefore, until the employee files an application for benefits, his rights are not "unconditional;" and since benefits at age 62 are in excess of ERISA requirements, plaintiffs' rights to those benefits are not "legally enforceable" against the Plan until the application for benefits is filed by the employee.

30. The case of *Cotter v. Eastern Conference of Teamsters Retirement Plan*, 898 F.2d 424 (4th Cir. 1990), is distinguishable from the case at bar. *Cotter* did not deal with rights to a benefit that was in excess to ERISA requirements (i.e. benefits at age 62). Mr. Cotter's right to benefits was based on a plan provision that expressly provided that benefits would commence "on the first day of the month immediately following the calendar month in which his employment ceases by reason other than death." *Id.* at 427. No such provision is involved in the present case. Further, Mr. Cotter was required to file an application before *any* benefits would be paid. In the present case, Pension Plan Section 5.04 provides for payment of benefits without an application once the employee attains the age of 65, thereby avoiding any forfeiture after attainment of normal retirement age.

31. Since no improper forfeiture of benefits occurred, the defendants did not construe the CLPT application requirements in a manner that clearly conflicts with the plain language of the Plan.

32. Therefore, defendants did not exercise their discretion in an arbitrary and capricious manner and are entitled to summary judgment on plaintiffs' third claim for violation of ERISA's nonforfeitability provision, 29 U.S.C. § 1053.

33. "Every pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1).

34. In light of this court's rulings on plaintiffs' first and third claims that without the filing of an application plaintiffs were not entitled to benefits at age 62, it follows that there were no benefits that defendants could assign in contravention of 29 U.S.C. § 1056(d) (1) until such application was filed.

35. Defendants are entitled to summary judgment on plaintiffs' fourth claim for violation of ERISA's non-assignment provision, 29 U.S.C. § 1056(d)(1).

36. "[A]n estoppel claim will not lie against a trust fund where recovery on the claim would contradict written plan provisions." *Watkins*, 12 F.3d at 1527; *Davidian v. Southern California Meat Cutters Union and Food Employees Benefit Fund*, 859 F.2d 134, 136 (9th Cir. 1988).

37. As determined hereinabove, the plain language of the Pension Plan requires an application be filed before benefit payments begin. To allow recovery against the CLPT would contradict the written provisions of the Pension Plan.

38. Defendants are entitled to summary judgment on plaintiffs' fifth claim for equitable right to benefits derived from estoppel.

39. In light of this court's ruling on plaintiffs' second claim, defendants are entitled to summary judgment on plaintiffs' sixth claim for breach of fiduciary duties owed the sub-class.

40. In *Luby v. Teamsters Health, Welfare and Pension trust Funds*, 944 F.2d 1176, 1186 (3rd Cir. 1991), the Court stated:

> Although ERISA itself does not explicitly provide a statutory right of restitution, it is clear that Congress intended federal courts to fashion a federal common law under ERISA, and this permits application of a federal common-law doctrine of unjust enrichment if restitution would not override a contractual provision of an ERISA plan.

41. Recovery of the overpayment to Canseco would not violate a contractual provision of the Pension Plan because Article V, Section 5.02, expressly provides for recovery of overpayment.

42. *British Motor Car Distributors, LTD., v. San Francisco Automotive Industries Welfare Fund,* 882 F.2d 371 (9th Cir. 1989) does not contradict *Luby* as claimed by Canseco. The 9th Circuit stated that "this court has not recognized any such common law action for restitution in favor of *employers.*" *Id.* at 377 (emphasis added). As distinguished from the case in *Luby,* the case at bar involves a recovery of overpaid benefits by the Trustees of the Pension Plan, not the employer.

43. Defendants are entitled to summary judgment on plaintiff Canseco's eighth claim to enjoin defendants from seeking to recover overpayments to Canseco.

Dated: 11/22/94

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States
District Judge

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA

PENSION FUND AND PLAN

OCTOBER 1, 1963

THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA

Operated under the terms of the Trust Indenture and Collective Bargaining Agreement made and entered into by the Employers and the Unions

PARTIES TO THE AGREEMENT

EMPLOYERS:

Southern California Chapter of the Associated General Contractors of America • Home Builders Association of Los Angeles, Orange, and Ventura Counties • Engineering and Grading Contractors Association • Building Contractors Association of California, Inc.

UNIONS:

Southern California District Council of Laborers and the following affiliated locals:

Bakersfield, Local 220; Bishop, Local 302; El Centro, Local 1119; El Monte, Local 1082; Long Beach, Local 507;

Los Angeles, Local 300; Pasadena, Local 439; Pomona, Local 806; Riverside, Local 1184; San Bernardino, Local 783; San Luis Obispo, Local 1464; San Pedro, Local 802; Santa Ana, Local 652, Santa Barbara, Local 591; Santa Maria, Local 1222; Ventura, Local 585; Housemovers Local 923.

TRUSTEES

For the Employers:	For the Unions:
Ray Alsweet	James V. Brimhall
James Crowell	James V. Flores
R. C. Gallyon	Joseph Lara
C. Irwin T. Johnson	W. Loyd Leiby
J. David Layden	J. L. Smith
W. O. Ramey	George Tarr
Reed Sprinkel	Ray Waters
H. L. Unmack	Ray M. Wilson

YOUR PENSION PLAN . . .

To Laborers eligible to participate:

This booklet is designed to give you a brief description of the benefits provided by your Pension Plan as well as a copy of the text of the plan. The plan became effective January 1, 1963.

A careful reading of this booklet will explain to you the requirements necessary for you to qualify for a pension.

As you know, these benefits are provided without contribution on your part and are the result of negotiations between your union and various employers.

Your Fund Trustees have provided for an annual audit by a Certified Public Accountant, have retained a Consultant, Attorneys, and have provided for a Corporate Co-Trustee as required under the California Retirement Systems Act.

Your Trust and Plan have been approved by the Treasury Department as meeting the requirements necessary for exemption of the Trust from income tax, for deductibility of Employer contributions as business expenses, and must continue to maintain approval in order to keep that status.

Your Trustees have attempted to secure the best possible program of benefits that can be provided for the money available. As your fund continues to grow and benefits are paid your Trustees will review the operation of the Fund in order to make certain the best possible plan is maintained consistent with the sound operation of the program.

BOARD OF TRUSTEES

* * *

NOTICE

The information in this booklet is explanatory of the general terms of the plan; but it is to be specifically understood that the same is subject to the terms and conditions of the Trust Agreement and Pension Plan; and the terms and conditions of said Trust Agreement and Plan are subject to change without notice to employees or their dependents.

APPENDIX

TEXT OF PENSION PLAN

of the

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA

This Plan is established under the Agreement and Declaration of Trust Establishing the Construction Laborers Pension Trust for Southern California dated October 16, 1962.

ARTICLE I – DEFINITIONS

Unless the context or subject matter otherwise requires, the following definitions shall govern in the Plan:

1.01. **Plan.** The term "Plan" shall mean the Pension Plan as defined in Section 3.09 of Article III of the Trust Agreement.

1.02. **Effective Date.** The term "Effective Date" shall mean the date on which contributions were first required to be made to the Fund, June 15, 1962.

1.03. **Collective Bargaining Agreement.** The term "Collective Bargaining Agreement" shall mean any Collective Bargaining Agreement defined in Section 3.01 of Article III of the Trust Agreement.

1.04. **Employer.** The term "Individual Employer" shall mean any Individual Employer as defined in Section 3.02 of Article III of the Trust Agreement.

1.05. **Employee.** The term "Employee" shall mean any Employee as defined in Section 3.03 of Article III of the Trust Agreement.

1.06. **Union.** The term "Union" shall mean any Union or District Council as defined in Section 3.04 of Article III of the Trust Agreement.

1.07. **Local Union.** The term "Local Union" shall mean any Local Union of the International Hod Carriers, Building and Common Laborers Union of America, A.F.L.-C.I.O. as defined in Section 3.05 of Article III of the Trust Agreement.

1.08. **Trust Agreement.** The term "Trust Agreement" shall mean the Trust Agreement establishing the Construction Laborers Pension Trust for Southern California, as defined in Section 3.10 of Article III of the Trust Agreement, and any amendments to or modifications of said Trust Agreement, or any extension or renewal thereof.

1.09. **Fund.** The term "Pension Fund" or "Fund" shall mean the Trust Fund as defined in Section 3.08 of Article III of the Trust Agreement.

1.10. **Board of Trustees.** The term "Board of Trustees" or "Board" shall mean the Board of Trustees established by the Trust Agreement.

1.11. **Covered Employment.** The term "Covered Employment" shall mean any employment in a capacity for which Contributions are payable to the Fund.

1.12. **Contributions.** The term "Contributions" shall mean any payment as defined in Section 3.11 of Article III of the Trust Agreement.

1.13. **Past Service.** The term "Past Service" shall mean the period or periods of employment of an Employee prior to June 15, 1962 to the extent credited in accordance with Article III of this Plan.

1.14. **Future Service.** The term "Future Service" shall mean employment on and after June 15, 1962 credited in accordance with Article III of this Plan.

1.15. **Credited Service.** The total years of Credited Service of an Employee shall be the sum of his Past Service Credit, if any, and his Future Service Credit, both as herein determined.

1.16. **Plan Year.** The term "Plan Year" shall mean the calendar year January 1 to December 31 of any year after December 31, 1936.

ARTICLE II – ELIGIBILITY

2.01. **Participation in Benefits.** Any Employee is eligible to participate in the benefits provided by this Plan provided that the inclusion of any such Employee is not a violation of any existing law or regulation.

• 2.02. **Normal Pension.** An Employee shall be entitled to retire on a Normal Pension under this Plan if he

(a) has attained age 62; and

(b) has completed at least 15 years of Credited Service as determined in accordance with Article III; and

(c) has actually worked in Covered Employment for at least 700 hours following the date with respect to which Contributions are first made for him.

• 2.03. **Early Retirement Pension.** An Employee shall be entitled to retire on an Early Retirement Pension under this Plan if he

(a) has attained age 55 but not yet attained age 62; and

(b) has completed at least 15 years of Credited Service, as determined in accordance with Article III, and

(c) has actually worked in Covered Employment for at least 700 hours following the date with respect to which Contributions are first made for him.

2.04. **Application.** An Employee who meets the conditions for eligibility set forth herein shall upon approval of an application submitted to the Board in a form satisfactory to the Board, become entitled to Pension Benefits under the Plan.

2.05. **False Statements.** If an Employee or Employee retired under the Plan or other claimant makes a false statement materially affecting the value or amount of his benefits, the Board shall be entitled to recoup, offset or recover the amount of any payment in excess of the amount to which such Employee or Employee retired under the Plan was entitled.

2.06. **Date of Commencement of Payment.** The earliest date for which any Pension Benefit shall be payable under this Plan is January 1, 1963. Pension Benefits with respect to any eligible Employee shall, subject to approval of the Employee's application by the Board, commence as of the first day of the calendar month next following receipt by the Board of his application for such Pension

Benefits, but in any event not earlier than the date of his eligibility for Pension Benefits. However, for purposes of this paragraph, any application received by the Board during the calendar year 1963 shall be deemed to have been received on December 31, 1962. Such payments shall continue for the life of the eligible Employee, subject however to all of the provisions of this Plan.

ARTICLE III – AMOUNT OF PENSION BENEFITS

• 3.01. **Normal Pension.** The monthly amount of Normal Pension payable to an Employee who is eligible to receive a Normal Pension in accordance with Section 2.02 of Article II shall be $53.40 reduced by 1/12th of $2.67, for each one-twelfth of a year of Credited Service less than twenty (20) full years. The monthly amount of Normal Pension shall be increased by one-twelfth of $2.67 for each one-twelfth of a year of Credited Service more than twenty (20) full years, to a maximum of twenty-five (25) full years or $66.75.

3.02. **Early Retirement Pension.** The monthly amount of Early Retirement Pension payable to an Employee who is eligible to receive an Early Retirement Pension in accordance with Section 2.03 of Article II shall be the actuarial equivalent, as determined by the Board, of the monthly Normal Pension based on Credited Service to the date of his actual retirement.

3.03. **Past Service Credit.**

(a) An Employee shall be entitled to Past Service Credit for each Plan Year or portion thereof, subsequent to December 31, 1936, he was employed prior to the Effective

Date in any of the classifications included in the Collective Bargaining Agreements and in the geographic areas covered by any of the Collective Bargaining Agreements, or was regularly employed by the Union, pursuant to the provisions of Article III, Section 3.02 of the Trust Agreement.

(b) An Employee shall be entitled to a full year of Past Service Credit for each Plan Year in which he was employed for 1200 hours or more. An Employee who was so employed for less than 1200 hours, but more than 300 hours in any Plan Year, shall receive 1/12th of a year's credit for each 100 hours of such employment.

(c) It is recognized that in many cases it will be difficult, because of changing employment, to produce evidence of past years of employment in the types of employment referred to in (a) above. If proof of actual number of hours of prior employment cannot be obtained the Board may establish such rules or regulations for determining Past Service Credit as shall be fair and equitable under the circumstances. Accordingly, a presumption is established that an Employee was engaged in employment entitling him to credit at the rate of 1200 hours in each Plan Year throughout the period of his continuous membership in good standing in the Union in the period January 1, 1937 to December 31, 1954; 1/12th year Past Service Credit for each month of such continuous membership. No period of membership shall be considered

as a part of continuous membership hereunder, if same occurs prior to any break in membership status.

3.04. **Proof of Entitlement to Past Service Credit.** The Employee making application for Past Service Credit shall do so on a form approved by the Board and signed by the Employee, which shall specify the periods during which the Employee was employed on work entitling him to such Past Service Credit and shall be confirmed by evidence satisfactory to the Board submitted by the Employee substantiating the employment claimed by the Employee. The Employee may submit to the Board any credible evidence of such covered employment, including but not limited to:

(1) Evidence of the receipt by the Laborers Health and Welfare Trust for Southern California of employer reports of contributions with respect to hours of work of the Employee and stating the number of hours reported for the period covered;

(2) A notarized statement from any employer certifying that the Employee performed services for such employer, during stated months, of the type required for Past Service Credit;

(3) A statement from the Federal Social Security Administration setting forth employment data during stated months;

(4) A Federal W-2 form or check stub furnished for work performed for any employer during stated months;

(5) A notarized statement from an authorized officer of a Local Union certifying that the

Employee was a member in good standing of the Local Union during stated months.

3.05. **Future Service Credit.** For Covered Employment after the Effective Date an Employee shall receive Future Service Credit for each Plan Year during which Contributions are made to the Pension Fund. An Employee shall be entitled to Future Service Credit for each calendar year during which Contributions are made for 1200 hours or more worked by the Employee in Covered Employment. An Employee who is employed for less than 1200 hours but more than 300 hours in any Plan Year shall receive 1/12th of a year's credit for each 100 hours of such employment for which Contributions are received.

• 3.06. **Continuity of Employment.** An Employee's previously accumulated credits for Future and Past Service shall be cancelled if he fails to earn Credited Service during a period of two consecutive calendar years. Such Credited Service shall not be cancelled if, in accordance with appropriate regulations adopted by the Board, the Employee is:

(a) on disability absence on account of illness or injury, not in excess of 12 months, or

(b) on military absence for service with the Armed Forces of the United States in time of war or national emergency, provided the Employee makes himself available for Covered Employment within 90 days after release from active duty, or

(c) serving as a full-time official of the union, or

(d) has accumulated 15 years of Credited Service.

Such Credited Service shall also not be cancelled with respect to any Employee if his failure to earn Credited Service for two consecutive calendar years commencing after June 15, 1962, is due to the fact that he is working under a labor agreement to which the union is a party which does not provide for the making of Employer Contributions to this Fund; provided, that, within a period of one year following the first re-opening or renewal of such labor agreement after June 15, 1962, provision is made in such agreement for the making of Employer Contributions to this Fund.

• 3.07. **Vested Pension Benefit.**

(a) An Employee who has accumulated 15 years of Credited Service, shall have a Vested Pension Benefit.

(b) If an Employee with a Vested Pension Benefit continues to be or is again employed by an Individual Employer prior to his retirement, his total Pension Benefit thereafter shall be determined by considering all his Credited Service on a basis determined by the Board consistent with that described in Article III of this Plan.

3.08. **Reemployment.**

(a) In order to receive a Pension payment under this Plan, a person must withdraw completely from any employment or occupation in any of the classifications included in the Collective Bargaining Agreements and in the geographic areas covered by any of the Collective Bargaining Agreements or

in regular employment by the Union, or for wages or profit in the building and construction industry.

(b) If a retired Former Employee engages in any occupation or employment in any of the classifications covered by any of the Collective Bargaining Agreements and in the geographic areas covered by any of the Collective Bargaining Agreements or in regular employment by the Union, or for wages or profit in the Building and Construction Industry, he shall not be entitled to Pension Benefits for any calendar month of such employment, and for six additional calendar months following termination of such occupation or employment. Also, he shall be required to give written notice of such occupation or employment to the Board within 15 days after the commencement of same. If he fails to give such written notice within such 15-day period he may at the discretion of the Board be disqualified for Pension Benefit for 12 calendar months in addition to the 6-month period of disqualification provided for above.

(c) A retired Former Employee receiving a Normal Pension or Early Retirement Pension who thereafter returns to Covered Employment shall upon subsequent retirement receive the same amount of Pension Benefit to which he became entitled upon his first retirement.

ARTICLE IV – AMENDMENT AND TERMINATION

4.01. **Amendment.** The Board of Trustees may amend or modify this Pension Plan at any time or from time to time in accordance with the Trust Agreement, except that no amendment or modification may reduce any benefits payable to a retired Former Employee who retired prior to such amendment or modification or any beneficiary entitled to payments from the Plan so long as funds are available for payment of such benefits. In no event shall any amendment or modification of this Pension Plan cause or result in any portion of the Fund to revert to, or be recovered by, Associations, Individual Employers, Local Unions or Union, or cause or result in the diversion of any portion of the Fund to any purpose other than the exclusive benefit of retired Former Employees under the Plan and the payment of the administrative expenses of the Fund and the Plan.

4.02. **Termination.** In event of the termination of this Plan, the Trust Fund shall be used and applied, to the extent that it is sufficient after deduction of expenses of administration and liquidation, for providing benefits of Employees in the following order of priority, based on Pension Credit to the date of termination of the Plan:

(a) First, for the benefit of retired Former Employees who have begun to receive monthly pension payments under the Plan; and

(b) Second, if any balance of the Trust Fund shall remain after the allocation is made pursuant to the foregoing paragraph (a), for the benefit of those persons then eligible to retire and receive Pension Benefits

under the Plan who have attained age 62 and for whom no Benefits have previously been provided; and

(c) Third, if any balance of the Trust Fund shall remain after the allocation is made pursuant to the foregoing paragraphs (a) and (b), for the benefit of those persons who have 15 years or more of Credited Service but who have not attained age 62; and

(d) Fourth, if any balance of the Trust Fund shall remain after allocation is made pursuant to the foregoing paragraphs (a), (b) and (c), for the benefit of all other Employees.

4.03. **Actuarial Valuations.** The Board shall have prepared annually an Actuarial Valuation of the Fund and shall take the actuarial status of the Fund into account in determining amendments or modifications of the Plan.

4.04. **Mental or Physical Incapacity.** In the discretion of the Board any pension payment due in the case of a retired Former Employee who, on the basis of information satisfactory to the Board, is unable to care for his affairs because of mental or physical incapacity, may be applied to the care and maintenance of such retired Former Employee in the manner decided by the Board (except that no payment shall be made to a governmental institution or facility if the retired Former Employee is not legally required to pay for his care and maintenance), unless prior to such payment claim shall have been made for such payment by a legally appointed guardian or other legally appointed representative.

ARTICLE V – TRUST AGREEMENT

This Pension Plan shall be attached to and by this reference made a part of the Trust Agreement to which it is an Appendix.

• Amended February 19, 1963, to be effective January 1, 1963.

•• Amended September 10, 1963, to be effective January 1, 1963.

Administrative Office

FUND ADMINISTRATIVE ASSOCIATES
810 South Spring Street, Room 800
Los Angeles 14, California
622-1212

App. 63

(LOGO) Construction Laborers
Pension Trust for
Southern California

PENSION PLAN

and

SUMMARY PLAN DESCRIPTION

MAY 1979

(UNION BUG)

SUMMARY OF PLAN PROVISIONS

The following is a summary of the principal benefit provisions of the Plan. This is intended to be only a general statement and references should be made to the Plan provisions for specific details. Nothing contained in this summary shall be deemed to change the provisions of the Plan. In the event of any discrepancy between this summary and the Plan, the Plan provisions will control.

1. A **Regular Pension** for employees who retire after satisfying one of the following sets of requirements: (See section 2.02)

PLAN ONE

A. He has attained Normal Retirement Age (i.e., age 65, or his age on the tenth anniversary of the commencement of his participation in the Plan, whichever is later).

B. He was employed for at least 1,000 hours in each of ten years after June 15, 1962, including at least three such years after December 31, 1970.

C. He worked in Covered Employment at least 700 hours following the date contributions were first made on his behalf.

PLAN TWO

A. He has attained age 62.

B. He has at least 15 years of credited service.

C. He worked in Covered Employment at least 700 hours following the date contributions were first made on his behalf.

PLAN THREE

A. He has at least 25 years of credited service.

B. He worked in Covered Employment at least 700 hours following the date contributions were first made on his behalf.

The Normal Pension amount is $32.40 per month multiplied by the number of years of credited service, except that credited service earned under the Plaster Tenders Pension Trust prior to October 1, 1974, is multiplied by $19.00. Benefits after October 1, 1970, based upon contributions at a rate less than the rate provided in the Master Labor Agreement are less than $32.40 per month. (See section 3.01) A year of credited service for the purpose of determining pension benefits is a 1,200 hour year (see section 4.05) (1,300 hours under the Plaster Tenders Pension Trust for the period 1937-1970. See section 8.04)

2. An **Early Retirement Pension** for employees who retire after the age of 55 but before age 62 with at least 15 years of credited service, including at least 700 hours following the date contributions were first made on his behalf. The amount of the Early Retirement Pension is the same as that for the Regular Pension to which the employee would be entitled, reduced to account for the greater number of years of benefit payments. The reduction is ½ of 1% for each month that the retiring employee is younger than age 62. (See section 2.03 and 3.02)

3. A **Disability Pension** for employees with at least 15 years of credited service (including at least 700 hours following the date contributions were first made on his

behalf) who become totally disabled and receive a Social Security Disability award. The Disability Pension amount is the same as that for the Regular Pension to which the employee would be entitled, reduced (if the employee is under age 62 and has less than 25 years of credited service) to account for the greater number of benefit payments. The reduction is 1/2 of 1% for each month that the retiring employee is younger than age 62 but not younger than age 55. (See section 2.04 and 3.03) A disability pension stops when the Social Security Disability award stops.

4. **Joint and Survivor Annuity.** For married employees, retirement benefits are paid in the form of a 50%, 66 2/3% or 100% Joint and Survivor Annuity unless this form is rejected by the employee with the written consent of the spouse. If not rejected, the benefit amount is reduced to reflect the additional cost of the joint and survivor form. If rejected, benefits are payable for the life of the employee without reduction. (See section 3.05)

5. **Survivor's Benefit.** If a deceased married employee had not retired but was eligible to retire on a Regular or Early Retirement Pension, his spouse receives a survivor's annuity. The survivor's annuity is payable for life and the monthly amount is 50% of the benefit the employee would have received had he retired on a 50% Joint and Survivor Annuity effective as of the first day of the month in which his death occurred. (See Section 2.05 and 3.04)

6. **Vested Rights** are provided for employees who (a) were employed for at least 1,000 hours in each of 10 years after June 15, 1962, including at least three such

years after December 31, 1970, or (b) have accumulated at least 15 years of credited service. (See Section 4.07)

7. **Pro Rata and Reciprocal Pensions** are provided for employees who would otherwise be ineligible for a pension because their years of employment have been divided between different pension plans, or whose pensions would be less than the full amount because of such division of employment. Related credits may not be used to establish eligibility for a Disability Pension or for a Survivor's Benefit, except a Survivor's Benefit for an employee eligible for Regular Retirement under Plan One. (See Articles VI and VII)

8. **Past Service Credit,** for employees retiring on or after January 1, 1970 may be given for the period January 1, 1941 to June 15, 1962 based upon employment or union membership as described in the Plan, provided the employee also shall have worked under the pension plan for at least 700 hours between June 15, 1962 and June 30, 1967. (See Section 4.01)

9. **Future Service Credits** are given for work under the Pension Plan on or after June 15, 1962. (See Section 4.02)

10. **Past and Future Service Credits** are given for honorable *Military Service* for employees who leave employment for which credited service is given to enter military service and return to such employment within ninety (90) days from discharge. (See Section 4.03, 4.04C)

11. In **computing benefits** 1/12 of a year credit is given for each 100 hours. However, under Plan One, at least 1,000 hours credit must be received in each plan

year to obtain any credit for that year. For all other retirements at least 300 hours credit must be received in each plan year to obtain any credit for that year. (See Section 4.05)

12. **Breaks in Service** are applied for failure to earn credited service before becoming vested. For Plan One, commencing January 1, 1976, a break in service occurs after a calendar year during which the employee has not completed at least 501 hours of service. If the number of consecutive breaks in service equals or exceeds the total number of years of credited service before the break, such years of service before the breaks are cancelled. A break shall not occur in any year in which the employee serves at least five (5) months in military service, to a maximum of five (5) consecutive years. For all plans before January 1, 1976 and for Plans Two and Three after January 1, 1976, a break in service shall occur if the employee fails to earn credited service during a period of two consecutive calendar years, unless excused by disability, military service, or service as union official or employer. (See Section 4.06)

13. **Reemployment** in the construction industry or in any type of work covered by a Laborers Collective Bargaining Agreement or in which other laborers are earning pension credits will result in suspension of the pension benefits payable to a retired employee.

14. **Payment of Pension Benefits** usually will not commence earlier than the first of the month following the filing of the pension application. (See Section 5.03, 5.04)

15. **Appeals** are permitted from a denial of a claim. Such appeal must be made in writing within ninety (90) days from the receipt of notice of denial. (See Article X)

16. **Pension credits for Plaster Tender employment** in Los Angeles and Orange Counties before October 1, 1974 are computed under the Plaster Tenders Plan, a copy of which is available at the Administration Office.

EXAMPLES OF RETIREMENT BENEFITS
PLAN ONE

NORMAL RETIREMENT*

AGE 65 OR OLDER

Years of Service of 1,200 hours or more**

	Monthly Benefit				
10	$324.00	15	$486.00	20	$648.00
11	356.40	16	518.40	21	680.40
12	388.80	17	550.80	22	712.80
13	421.20	18	583.20	23	745.20
14	453.60	19	615.60	24	777.60
				25	810.00

* Please refer to qualification requirements for Plan One on page (8.) Section 2.02

** If any of your credited years for vesting purposes are less than 1,200 hours your benefits for those years will be proportionally reduced (see Section 4.05A)

EXAMPLES OF RETIREMENT BENEFITS FOR PLANS TWO & THREE & EARLY RETIREMENT

Years Service	REGULAR Age 62 or Older	61	60	59	58	57	56	55
15	$486.00	$456.84	$427.68	$398.52	$369.36	$340.20	$311.04	$281.88
16	518.40	487.29	456.19	425.08	393.98	362.88	331.77	300.67
17	550.80	517.75	484.70	451.65	418.60	385.56	352.51	319.46
18	583.20	548.20	513.21	478.22	443.23	408.24	373.24	338.25
19	615.60	578.66	541.72	504.79	467.85	430.92	393.98	357.04
20	648.00	609.12	570.24	531.36	492.48	453.60	414.72	375.84
21	680.40	639.57	598.75	557.92	517.10	476.28	435.45	394.63
22	712.80	670.03	627.26	584.49	541.72	498.96	456.19	413.42
23	745.20	700.48	655.77	611.06	566.35	521.64	476.92	432.21
24	777.60	730.94	684.28	637.63	590.97	544.32	497.66	451.00
25*	810.00							
26	842.40							
27	874.80							
28	907.20							
29	939.60							
30	972.00							

*An employee with 25 years or more of service may retire at any age.

APPENDIX

TEXT OF PENSION PLAN

of the
CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA

This Plan is established under the Agreement and Declaration of Trust Establishing the Construction Laborers Pension Trust for Southern California dated October 16, 1962.

ARTICLE I – DEFINITIONS

Unless the context or subject matter otherwise requires, the following definitions shall govern in the Plan:

1.01. **Plan.** The term "Plan" shall mean the Pension Plan as defined in Section 3.09 of Article III of the Trust Agreement.

1.02. **Effective Date.** The term "Effective Date" shall mean the date on which contributions were first required to be made to the Fund, June 15, 1962.

1.03. **Collective Bargaining Agreement.** The term "Collective Bargaining Agreement" shall mean any Collective Bargaining Agreement defined in Section 3.01 of Article III of the Trust Agreement.

1.04. **Employer.** The term "Individual Employer" shall mean any Individual Employer as defined in Section 3.02 of Article III of the Trust Agreement.

1.05. **Employee.** The term "Employee" shall mean any Employee as defined in Section 3.03 of Article III of the Trust Agreement.

1.06. **Union.** The term "Union" shall mean any Union or District Council as defined in Section 3.04 of Article III of the Trust Agreement.

1.07. **Local Union.** The term "Local Union" shall mean any Local Union of the Laborers' International Union of North America, A.F.L.-C.I.O. as defined in Section 3.05 of Article III of the Trust Agreement.

1.08. **Trust Agreement.** The term "Trust Agreement" shall mean the Trust Agreement establishing the Construction Laborers Pension Trust for Southern California, as defined in Section 3.10 of Article III of the Trust Agreement, and any amendments to or modifications of said Trust Agreement, or any extension or renewal thereof.

1.09. **Fund.** The term "Pension Fund" or "Fund" shall mean the Trust Fund as defined in Section 3.08 of Article III of the Trust Agreement.

1.10. **Board of Trustees.** The term "Board of Trustees" or "Board" shall mean the Board of Trustees established by the Trust Agreement.

1.11. **Covered Employment.** The term "Covered Employment" shall mean any employment in a capacity for which Contributions are payable to the Fund.

1.12. **Contributions.** The term "Contributions" shall mean any payment as defined in Section 3.11 of Article III of the Trust Agreement.

1.13. **Past Service.** The term "Past Service" shall mean the period or periods of employment of an Employee prior to June 15, 1962, to the extent credited in accordance with Article III of this Plan.

1.14. **Future Service.** The term "Future Service" shall mean employment on and after June 15, 1962, credited in accordance with Article III of this Plan.

1.15. **Credited Service.** The total years of Credited Service of an Employee shall be the sum of his Past Service Credit, if any, and his Future Service Credit, both as herein determined.

1.16. **Plan Year.** The term "Plan Year" shall mean the calendar year January 1 to December 31 of any year after December 31, 1940.

1.17. **Participant.** The term "Participant" means and includes the following:

(a) All employees and former employees with accumulated credited service which has not been cancelled.

(b) Retired employees receiving benefits from the fund.

(c) Beneficiaries of deceased employees receiving benefits from the fund.

1.18. **ERISA.** The term "ERISA" means the Employees [sic] Retirement Income Security Act of 1974 as amended.

1.19. **Hour of Service.** The term "hour of service" means each hour for which an employee is directly or indirectly paid or entitled to payment, by the employer

for the performance of duties during the applicable computation period. Also, for purposes of determining whether an employee has incurred a break in service under 4.06B an "hour of service" shall also include each hour for which an employee is directly or indirectly paid or entitled to payment by the employer for reasons other than for the performance of duties.

1.20. **Normal Retirement Age.** The term "Normal Retirement Age" as the term is used in ERISA, means age 65, or the age on the 10th anniversary of the employee's commencement of participation in the Plan, whichever is later.

1.21. **Commencement of Participation.** The term "Commencement of Participation" for purposes of determining Normal Retirement Age shall be the first plan year after the effective date in which the employee earns at least 1000 hours of service; or any earlier date required by law.

ARTICLE II – ELIGIBILITY FOR RETIREMENT BENEFITS

2.01. **Participation in Benefits.** An Employee is eligible to participate in the benefits provided by this Plan provided that the inclusion of such Employee is not a violation of any existing law or regulation.

2.02. **Regular Pension.** An employee shall be entitled to retire on a Regular Pension under this Plan if he satisfies all of the requirements of one of the following Plans:

PLAN ONE

A. He has completed at least 10 years of credited service after June 15, 1962 as determined in accordance with Article IV in each year of which he was employed not less than 1000 hours.

B. 3 of said years of credited service must have been completed after December 31, 1970.

C. He has attained Normal Retirement age.

D. He has actually worked in Covered Employment for at least 700 hours following the date with respect to which contributions are first made for him.

PLAN TWO

A. He has completed at least 15 years of credited service as determined in accordance with Article IV.

B. He has attained age 62.

C. He has actually worked in Covered Employment for at least 700 hours following the date with respect to which contributions are first made for him.

PLAN THREE

A. He has completed at least 25 years of credited service as determined in accordance with Article IV; or has received 25 years of combined pension credit as defined in Section 6.05 hereof (provided that if based upon combined pension credits that the related plan which provided the related credits has adopted similar retirement provisions).

B. He has actually worked in Covered Employment for at least 700 hours following the date with respect to which contributions are first made for him.

2.03. **Early Retirement Pension.** An Employee shall be entitled to retire on an Early Retirement Pension under this Plan if he satisfies all of the following requirements:

A. He has completed at least 15 years of credited service as determined in accordance with Article IV.

B. He has attained age 55 but not yet attained age 62.

C. He has actually worked in Covered Employment for at least 700 hours following the date with respect to which contributions are first made for him.

2.04. **Disability Pension.** An Employee shall be entitled to retire on a Disability Pension under this Plan if he satisfies all of the following requirements:

(a) has received a Total Disability Award from Federal Social Security Administration; and

(b) has completed at least 15 years of Credited Service as determined in accordance with Article IV; and

(c) has actually worked in Covered Employment for at least 700 hours following the date with respect to which contributions are first required to be made for him.

The employee's right to a Disability Pension shall terminate upon termination or suspension of his Total Disability Award from Federal Social Security Administration.

Related credits under Articles VI and VII may not be used to establish eligibility for a disability pension.

An employee retired under Regular Retirement or Early Retirement who has not yet reached the age of 65 and who, after retirement, receives a total disability award from Federal Social Security Administration may, upon application in writing to the Board, and proof of the receipt of his Social Security Total Disability Award, be entitled to have his pension designated as a disability pension during the continuance of his Social Security Total Disability Award. Such change in designation shall have no effect upon the amount of pension benefits which he shall be entitled to receive.

2.05. **Survivors Benefit**

(a) A Survivors Benefit shall be paid in the event of the death, on or after October 1, 1970, of an employee who, at the time of his death, was entitled to retire on a Regular or Early Retirement Pension, as provided in Sections 2.02 and 2.03, if such employee leaves a lawful surviving spouse.

(b) A Survivors Benefit shall not be payable where an employee dies after the date of retirement, even though death may occur during a period when the employee has returned to work following retirement.

(c) The Survivors Benefit shall not be payable if the employee's eligibility for retirement is based upon related credits under Article VI or Article VII.

However, anything to the contrary stated above notwithstanding, effective as to employees dying on or after

January 1, 1976, a survivors benefit is payable if the employee was eligible for Regular Retirement under Plan One, even if based upon related credits.

ARTICLE III
AMOUNT OF PENSION BENEFITS

Pensions are payable in the form of a straight life annuity.

3.01. **Normal Pension.** The monthly amount of Normal Pension payable to an Employee who is eligible to receive a Normal Pension in accordance with Section 2.02 of Article II, shall be as follows:

(a) For all Past Service Credits and for all Future Service Credits to October 1, 1970, $32.40 for each full year of Credited Service and $2.70 per month for each fractional year of Credited Service.

(b) For all Future Service Credits commencing October 1, 1970, granted for hourly contributions at the rate provided in the Southern California Master Labor Agreement negotiated by the Joint Negotiating Committee between the Employer Associations and the Union named in Article I of the Trust Agreement, the sum of $32.40 for each full year of Credited Service and $2.70 per month for each fractional year of Credited Service.

(c) For all Future Service Credits after October 1, 1970 and before January 1, 1978, granted for hourly contributions at a rate less than that provided in the Southern California Master Labor Agreement, a sum which shall bear the same proportion to $32.40 per year or $2.70 per

month, as the hourly contribution on which such Credited Service is based bears to the sum of $1.35 per hour but in no event more than $32.40 per year or $2.70 per month. If, in any one calendar month contributions for an employee shall be made at more than one rate, the Credited Service for that month shall be determined as if all of the contributions were made at the lower contribution rate.

(d) For all Future Service Credits on and after January 1, 1978 granted for hourly contributions at a rate less than that provided in the Southern California Master Labor Agreement, a sum which shall bear the same proportion to $32.40 per year or $2.70 per month, as the hourly contribution on which such Credited Service is based bears to the Master Labor Agreement Hourly Contribution Rate. If, in any one calendar month contributions for an employee shall be made at more than one rate, the Credited Service for that month shall be determined as if all of the contributions were made at the lower contribution rate.

3.02. **Early Retirement Pension.** The monthly amount of Early Retirement Pension payable to an employee who is eligible to receive an Early Retirement Pension in accordance with Section 2.03 of Article II shall be the actuarial equivalent as determined by the Board of the monthly Regular Pension based on credited service to the date of his actual retirement.

3.03. **Disability Pension.** The monthly amount of Disability Pension payable to an Employee who is eligible to receive a Disability Pension in accordance with Section 2.04 of Article II shall be the same as the Regular Pension

as provided in Section 3.01 of Article III with respect to all Employees whose application for Pension benefits is filed prior to June 1, 1973. With respect to Employees whose application for Pension benefits is filed on or after June 1, 1973, the amount of Disability Pension for all Employees under 62 years of age with less than 25 years of credited service shall be the same as the Early Retirement Pension as provided in Section 3.02 of Article III, depending upon the age of the Employee at the time of retirement. However, the amount of Disability Pension for Employees less than 55 years of age shall be computed as if they were 55 years of age at the time of retirement.

3.04. **Survivors Benefit.** The monthly amount of Survivors Benefit payable under Section 2.05 shall be an amount equal to 50% of the pension to which the employee would have been entitled if he had retired with a 50% joint and survivor annuity effective as of the first day of the month in which his death occurred. The survivor's benefit shall be paid monthly commencing as of the first day of the month following the death of the employee and shall continue for the life of the survivor and shall terminate upon the last day of the month in which the survivor's death occurs.

3.05. **Joint and Survivor Annuity.** Benefits paid to an Employee retiring on or after January 1, 1976 shall be paid in the form of a joint and survivor annuity unless the Employee, prior to cashing his first pension check, shall elect, in writing, with the written approval of his spouse, not to take a joint and survivor annuity. Any election not to take a joint survivor annuity is revocable until the Employee shall cash his first pension check or

for a period of ninety (90) days after he executes his pension application, whichever date shall be the later. However, the Board may delay issuance of the first benefit check until ninety (90) days after the execution of the pension application.

After the Employee has cashed his first pension check or after ninety (90) days from the date of execution of the pension application shall have expired, whichever shall be later, the election to take or reject a joint and survivor annuity shall be final and shall not thereafter be changed even though the Employee may have returned to work.

The joint annuitant (contingent annuitant) must be the lawful spouse of the employee at the time of commencement of the employee's pension.

The amount of the Joint and Survivor Annuity payable to the employee shall be the actuarial equivalent as determined by the Board of the pension benefit which the employee would have been entitled to receive if the Joint and Survivor Annuity had not been selected.

A Joint and Survivor Annuity shall provide for a monthly pension benefit for the life of the employee and thereafter a monthly pension benefit in an equal amount or in an amount equal to two-thirds of the monthly pension benefit of the employee or in an amount equal to one-half of the monthly pension benefit of the employee (whichever amount the employee shall have elected) for the life of the employee's joint annuitant, providing that the joint annuitant shall survive the death of the employee.

If no election has been made by the employee as to the amount of the survivor annuity, same shall be in an amount equal to one-half of the monthly pension benefit of the employee.

Proof of the joint annuitant's age and relationship to the employee, in a form satisfactory to the Board, must be furnished to the Board.

In the event that an employee dies prior to his date of retirement, the joint annuitant shall receive no benefits.

3.06. **Maximum Benefits.** Anything to the contrary herein above stated notwithstanding, the maximum annual benefit provided under the foregoing sections will be a straight life annuity without an auxiliary benefit which does not exceed the lesser of (a) $75,000.00 or (b) 100% of the participant's average compensation for his three consecutive highest paid years. In order to achieve the maximum benefit an employee must have been an active participant for 10 years. However, if retirement benefits payable with respect to a participant under the plan and under all other defined benefit plans of the employer do not exceed $10,000.00 for the plan year and if the employer has not at any time maintained a defined contribution plan in which the participant participated, the benefits payable shall be deemed not to exceed the limitation herein contained. The dollar amounts set forth herein are subject to adjustment as provided by law.

ARTICLE IV
COMPUTATION OF CREDITED SERVICE

4.01. **Past Service Credit.**

(a) An Employee whose date of Retirement shall be prior to January 1, 1968, shall be entitled to Past Service Credits for each Plan Year or portion thereof subsequent to December 31, 1936, he was employed prior to the effective date as an Employee as defined in Section 1.05 of Article I. An Employee whose date of Retirement shall occur in the year 1968 shall be entitled to Past Service Credits for employment prior to the effective date but subsequent to December 31, 1938. An Employee whose retirement date occurs during 1969 shall be entitled to Past Service Credits for service prior to the effective date but subsequent to December 31, 1939. An Employee whose retirement date occurs on or after January 1, 1970, shall be entitled to Past Service Credits for service prior to the effective date but subsequent to December 31, 1940.

(b) It is recognized that in many cases it will be difficult, because of changing employment, to produce evidence of past years of employment in the type of employment referred to in (a) above. Therefore, in lieu, of proof of actual number of hours of prior employment an Employee shall be entitled to a full year of Past Service Credit for each Plan Year throughout the period of his continuous membership in good standing in the Union in the period January 1, 1937 (or such later date as may be applicable to the particular Employee as a limitation on Past Service Credits as provided in Sub-Paragraph (a) above) to December 31, 1957; one-twelfth (1/12th) year Past Service Credit for each month of such continuous

membership. No period of membership shall be considered as a part of continuous membership hereunder, if same occurs prior to any break in membership status. However, past service pension credits will not be granted for continuous union membership, for such periods of time as social security data shall show that the employee worked out of the geographical area covered by the Laborers Southern California Master Labor Agreement. In other cases, if proof of actual number of hours of prior employment cannot be obtained, the Board may establish such rules or regulations for determining Past Service Credit as shall be fair and equitable under the circumstances.

(c) No Past Service Credits shall be granted unless the Employee shall have also actually worked in Covered Employment for at least 700 hours between June 15, 1962, and June 30, 1967.

(d) **Proof of Entitlement to Past Service Credit.** The Employee making application for Past Service Credit shall do so on a form approved by the Board and signed by the Employee, which shall specify the periods during which the Employee was employed on work entitling him to such Past Service Credit and shall be confirmed by evidence satisfactory to the Board submitted by the Employee substantiating the employment claimed by the Employee. The Employee may submit to the Board any credible evidence of such covered employment, including both not limited to:

(1) Evidence of the receipt by the Laborers Health and Welfare Trust for Southern California of employer reports of contributions with respect to hours of work of the Employee and stating the number of hours reported for the period covered;

(2) A notarized statement from any employer certifying that the Employee performed services for such employer, during stated months, of the type required for Past Service Credit;

(3) A statement from the Federal Social Security Administration setting forth employment data during stated months;

(4) A Federal W-2 form or check stub furnished for work performed for any employer during stated months;

(5) A notarized statement from an authorized officer of a Local Union certifying that the Employee was a member in good standing of the Local Union during stated months.

4.02. **Future Service Credit.** For Covered Employment after the effective date, an employee shall receive future service credit for each Plan Year during which contributions are due and payable to the Pension Fund for work performed by the Employee.

4.03. **Military Service Credit.** An Employee shall be entitled to credited service for each Plan Year or portion thereof he served honorably in the Armed Forces of the United States, provided that:

(a) If such service occurred before the effective date, such service occurred during the time the Employee would have been entitled to Past Service Credit for covered employment; and

(b) In order to perform such service he left employment as an Employee as defined in Section 1.05 of Article I; and

(c) He made application for Covered Employment within 90 days after he was relieved from such service or, if totally disabled at the time of termination of military service, he made application for Covered Employment within 90 days after the termination of such disability, but in no event later than one year following his discharge from military.

4.04. **Amount of Credited Service for *Vesting* Purposes Only.**

A. For Regular Retirement under Plan One.

(a) An Employee shall be entitled to a full year of credited service for vesting purposes only for each Plan Year commencing January 1, 1971 in which he was employed for 1000 hours or more.

(b) If an Employee is employed for 1000 hours or more in not less than 3 Plan Years after December 31, 1970 he shall also be entitled to a full year of credited service, for vesting purposes only, for each Plan Year after June 15, 1962 and before January 1, 1971 in which he was employed for 1000 hours or more.

(c) If an Employee is employed after June 15, 1962 for 1000 hours or more in the 12 consecutive months served beginning with his first hour of employment, or his first hour of his employment following a break in service in which he lost all previously accumulated credited service, and if he would be entitled to credited service under Paragraphs (a) and (b) above, if said 1000 hours were earned in one Plan Year, he shall be entitled to credited service on a prorated basis for each of the Plan Years in which such employment occurred.

B. For Regular Retirement under Plan Two and Plan Three and for Early Retirement.

(a) An Employee shall be entitled to a full year of past service credit for each Plan Year after December 31, 1940 and before June 15, 1962 in which he was employed for 1200 hours or more. An Employee who was so employed for less than 1200 but more than 300 hours in any such Plan Year shall receive 1/12th of a year's credit for each 100 hours of such employment.

(b) An Employee shall be entitled to a full year of future service credit for each calendar year commencing June 15, 1962 during which contributions are due and payable for 1200 hours or more worked by the Employee in Covered Employment. An Employee who is employed for less than 1200 hours but more than 300 hours in any Plan Year shall receive 1/12th of a year's credit for each 100 hours of such employment for which contributions are due and payable.

C. An Employee shall be entitled to credit for military service as provided in this Plan, 1/12th year of credited service for each month of such service not to exceed 5 years.

(Granting of credited service is subject to break in service rules in Section 4.06)

4.05. **Amount of Credited Service for *Benefit* Purposes Only.**

A. For Regular Retirement under Plan One.

For Computation of Benefits as provided in Article III, an Employee shall be entitled to a full year of credited service for Each Plan Year for which he received at least

1200 hours of future credits; and if he received less than 1200 hours of such credit but at least 1000 hours, he shall receive 1/12th of a year's credit for each 100 hours.

B. For all other Retirements.

For Computation of Benefits as provided in Article III, an Employee shall be entitled to a full year of credited service for each Plan Year for which he received at least 1200 hours of past, future or military service credits; and if he received less than 1200 hours of such credit but more than 300 hours, he shall receive 1/12th of a year's credit for each 100 hours.

4.06. **Continuity of Employment. (Break in Service)**

A. Rules before January 1, 1976 for all Plans, and after January 1, 1976 for all Plans *except* Regular Pension Plan One.

An Employee's previously accumulated credits for Future and Past Service shall be cancelled if he fails to earn Credited Service during a period of two consecutive calendar years. Such Credited Service shall not be cancelled if, in accordance with appropriate regulations adopted by the Board, the Employee

(a) is totally disabled from engaging in any occupation or employment on account of illness or injury. For purposes of this paragraph, if such total disability exists for at least 90 days in any calendar year, such year shall not be counted as a break in service year; or

(b) is in the Military Service with the Armed Forces of the United States for not less than 90 days in any calendar year. Military Service may be used

for not more than 5 consecutive years to avoid a break in service; or

(c) is serving as a full-time official of the District Council or Local Union as defined in this Plan, or

(d) is serving as a full-time Employer as defined in this Plan, or

(e) has accumulated 15 years of Credited Service.

Such Credited Service shall also not be cancelled with respect to any Employee if his failure to earn Credited Service for two consecutive calendar years between June 15, 1962 and December 31, 1967 is due to the fact that he is working in the jurisdiction of this Trust under a Labor Agreement to which the Union is a party, which Agreement was currently signed by the Employer and which Agreement does not provide for the making of Employer contributions to this Fund. Nothing contained herein shall be deemed to relieve the Employee of the necessity of actually working in Covered Employment at least 700 hours between June 15, 1962 and June 30, 1967 in order to utilize Past Service Credits, as provided in Section 4.01(c).

In the event that a break in service should occur after the filing of a Pension Application, which is subsequently denied, the effective date of such break in service shall be extended for a period of time equal to that transpiring between the date of filing of application and the date of notification of denial.

In the event that a pension has been granted in error based upon erroneous credits without which the Employee would have been ineligible for a pension; and if, a break in service would have occurred by reason of

the deletion of such erroneously granted credits, the effective date of such break in service shall be extended for a period of two (2) years commencing upon the date of notification of the Employee by the Trust that his pension had been granted in error, or commencing upon the date of enactment of this amendment, whichever shall be later.

B. Rules commencing January 1, 1976 for Regular Pension Plan *One*.

(a) For purposes of this Section a "year of service" means a calendar year during which the participant completed 501 or more Hours of Service.

(b) For purposes of this Section, the term "one year break in service" means a calendar year during which the participant has not completed 501 or more Hours of Service.

(c) Pre 1976 credits cancelled under Plan Break in Service Rules in existence before January 1, 1976 shall remain cancelled.

(d) In the case of any employee who has any one year break in service, years of service before such break shall not be required to be taken into account until he has completed a year of service after his return.

(e) In the case of any employee who has not yet completed 10 years of credited service, computed as provided in 4.04A, years of service before any one year break in service shall not be required to be taken into account if the number of consecutive one year breaks in service equals or exceeds the aggregate number of such years of service prior to such break. Such aggregate number of years of service before such break

shall be deemed not to include any years of service not required to be taken into account by reason of any prior break in service; and shall be deemed not to include any calendar years in which the employee completed less than 1000 hours of service.

(f) Break in service shall not occur in any calendar year in which the Employee serves at least 5 months in the Military Service with the Armed Forces of the United States. Military Service may be used for not more than 5 consecutive years to avoid a break in service.

4.07. **Vested Pension.**

(a) An Employee who has accumulated 10 years of credited service computed as provided in Sections 4.04A and 4.06 shall have a vested pension.

(b) An Employee who has accumulated 15 years of credited service computed as provided in Sections 4.04B and 4.06 shall have a vested pension; provided however that if said 15 years of credited service are all past service credits then the employee, in order to be vested, must also have actually worked in Covered Employment for at least 700 hours between June 15, 1962 and June 30, 1967.

(c) If an Employee with a Vested Pension Benefit continues to be or is again employed by an Individual Employer prior to his retirement, his total Pension Benefit thereafter shall be determined by considering all his Credited Service on a basis determined by the Board consistent with that described in Article III of this Plan.

4.08. **Reemployment.**

A. Payment of pension benefits under this Plan shall be suspended for any month during which the Employee is employed in any of the following jobs in any geographic area covered by this Plan or any Related Plan referred to in Article VI and Article VII:

(a) In any job classification in the construction industry; or

(b) In any job classification in which any participant under this Plan has earned or is earning future service credits in any other industry in which the Union has a substantial number of collective bargaining agreements; or

(c) In any other employment which is covered by a collective bargaining agreement with the Union, whether or not such agreement requires contributions to this Trust.

For purposes of this Section, the term "employed" shall also include but not be limited to any work, labor or services rendered as an employee, independent contractor, consultant, sole proprietor, partner or otherwise.

B. A retired former employee receiving a Pension who thereafter returns to Covered Employment shall be entitled to Future Service Credits for Covered Employment which shall be added to his Credited Service as it existed at the time of retirement and shall, upon subsequent retirement, receive Pension Benefits computed upon Total Credited Service including the Future Service Credits received after returning to Covered Employment.

4.09. **Additional Time for Minimum Future Service Credits.** The time in which an employee must work

for at least 700 hours after June 15, 1962, which time terminates June 30, 1967, under the provisions of Section 4.01(c), 4.06 and 4.07(b), may be extended as follows:

In the event the Employee shall have been totally and continuously disabled for a period of not less than 4 years between June 15, 1962, and June 30, 1967, the time within which the Employee must work the said 700 hours shall be extended beyond June 30, 1967, for a period of one year, commencing upon the termination of such total and continuous disability, or commencing upon the date of enactment of this Amendment, whichever shall be later. "Total and continuous disability" shall be subject to such further definition and proof as the Board in its discretion shall determine.

In the event the Employee shall be 70 years of age or older on June 15, 1962, and shall apply for a pension prior to June 30, 1967, and at the time of making application for such pension shall have worked at least 650 hours after June 15, 1962, the time for working the additional hours required to make a total of 700 hours after June 15, 1962, shall be extended beyond June 30, 1967, for a period of 30 days after the Employee shall have received written notice from the Trust as to the number of additional hours of work required for eligibility for retirement.

In the event the Employee shall have worked in the jurisdiction of this Trust between June 15, 1962 and June 30, 1967 under a Labor Agreement to which the Union is a party, which agreement was currently signed by the Employer and which agreement did not provide for the making of Employer contributions to this Fund, the time within which the Employee must work the said 700 hours

shall be extended beyond June 30, 1967 for a period of time equal to the time of such employment between June 15, 1962 and June 30, 1967.

If the existence of a signed Labor Agreement with the Union during the employment cannot be established, evidence of a previously signed Labor Agreement plus proof of the Employee's membership in good standing in the Union during the employment will be sufficient to extend the time within which the Employee must work the said 700 hours, for a period of time equal to the time between June 15, 1962 and June 30, 1967, during which the Employee engaged in such employment while a member in good standing of the Union.

In the event that a pension has been granted in error based upon hours erroneously credited to the Employee's account, without which the Employee would have been ineligible for a pension by reason of failure to satisfy the 700 hour rule, the time within which the Employee must work the said 700 hours shall be extended beyond June 30, 1967 for a period of one (1) year commencing upon the date of notification of the Employee by the Trust of the fact that his pension had been granted in error, or commencing upon the date of enactment of this amendment, whichever shall be later.

ARTICLE V
PAYMENT OF BENEFITS

5.01. **Application.** An Employee who meets the conditions for eligibility set forth herein shall, upon approval

of an application submitted to the Board in a form satisfactory to the Board, become entitled to Pension Benefits under the Plan.

5.02. **False Statements.** If an Employee or Employee retired under the Plan or other claimant makes a false statement materially affecting the value or amount of his benefits, the Board shall be entitled to recoup, offset or recover the amount of any payment in excess of the amount to which such Employee or Employee retired under the Plan was entitled.

5.03. **Date of Commencement of Payment.** The earliest date for which any Pension Benefit shall be payable under this Plan is January 1, 1963. Pension Benefits with respect to any eligible Employee shall, subject to approval of the Employee's application by the Board, commence as of the first day of the calendar month next following the month in which the applicant fills out and signs his pension application provided that such application is received by the Board not later than the 15th day of the month next following the month in which such pension application is filled out and signed, if not received by the 15th of the month, pension benefits shall commence as of the 1st day of the calendar month next following receipt by the Board of the pension application. In any event Pension Benefits shall not commence earlier than the date of the Employee's eligibility for Pension Benefits. However, in the event an Employee retires under the provisions of Article VI or Article VII of this Plan, Pension Benefits may commence as of the first day of the calendar month next following receipt by this Board or by the Board of a Related Plan of his application for such Benefits, whichever date may be earlier, but in any event not

earlier than the date of his eligibility for Pension Benefits. Such payments shall continue for the life of the eligible Employee, subject however to all of the provisions of this Plan.

For purposes of this Paragraph, any application received by the Board during the calendar year 1963 shall be deemed to have been received on December 31, 1962. Disability Pension Benefits shall not, in any event, commence earlier than the effective date of the Employee's Total Disability Social Security Award.

5.04. **Maximum Commencement Dates.**

Notwithstanding anything to the contrary contained above, and unless the Employee elects otherwise, the payment of an Employee's retirement benefit shall commence not later than March 1 of the year following the calendar year in which the latest of the following events occurs: (a) The Employee's attainment of age 65. (b) The lapse of 10 years since the Employee commenced participation in the Plan. (c) The termination of the Employee's service under this or a related Plan. (d) A date later than the latest date specified in (a) (b) or (c) if the Employee elects in writing to have payment of benefits commence on such later date.

With respect to an employee who has satisfied the service requirements for an early retirement benefit but who separated from employment before satisfying the age requirement for early retirement, such employee shall be entitled, upon approval of his application, to payment of an Early Retirement Benefit commencing upon satisfaction of the age requirement unless he shall elect in

writing to have payment of benefits commence on a later date.

ARTICLE VI
PRO RATA PENSIONS

[Sections Omitted In Printing]

ARTICLE VII
RECIPROCAL PENSIONS

[Sections Omitted In Printing]

ARTICLE VIII

Special Provisions Applicable only to Plaster Tenders Merger.

[Sections Omitted In Printing]

ARTICLE IX
AMENDMENT AND TERMINATION

9.01. **Amendment.** The Board of Trustees may amend or modify this Pension Plan at any time or from time to time in accordance with the Trust Agreement. In no event shall any amendment or modification of this Pension Plan cause or result in any portion of the Fund to revert to, or be recovered by, Associations, Individual Employers, Local Unions or Union, or cause or result in the diversion of any portion of the Fund to any purpose other than the exclusive benefit of retired Former Employees under the Plan and the payment of the administrative expenses of the Fund and the Plan.

9.02. **Termination.** In event of the termination of this Plan, the Trust Fund shall be used and applied, to the extent that it is sufficient after deduction of expenses of administration and liquidation, for providing benefits of Employees in the following order of priority, based on Pension Credit to the date of termination of the Plan:

(a) In the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the three year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5 year period ending on such date) under which such benefit would be the least.

(b) In the case of a participant's or beneficiary benefit (other than a benefit described in paragraph (a)) which would have been in pay status as of the beginning of such three year period if the participant had retired prior to the beginning of the three year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the five year period ending on such date) under which such benefit would be the least.

(c) As to all other benefits (if any) of individuals under the plan guaranteed under title IV of ERISA.

(d) To other non-forfeitable benefits under the plan.

(e) To all other benefits under the plan.

The above provisions relating to Termination are subject to the provisions of ERISA and regulations issued thereunder. In the event of any conflict between these provisions and those contained in ERISA, this agreement shall be deemed amended to conform with the requirements of ERISA.

ARTICLE X
APPEALS

If a claim for benefits made by any participant or beneficiary is wholly or partially denied, notice of the decision shall be furnished to the claimant within a reasonable period of time after receiving the claim by the Plan. Such notice shall be in writing and shall set forth the specific reason or reasons for denial, specific reference to pertinent Plan provisions on which the denial is based, a description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and an explanation of the Plan's claim review procedure. Every claimant shall have a reasonable opportunity to appeal the denial of a claim for a full and fair review. With respect to claims processed by an insurance company or by an independent claims administrator appointed by the Trustees, such review and final decision of the denied claim may be made by such insurance company or claims administrator. With respect to claims processed by the Trustees such review and final decision of a denied claim shall be made by the Trustees. Appeal from a denial of a claim shall be made in writing by a claimant or his duly authorized representative who may review pertinent documents and may submit issues and

comments in writing. Requests for review of a denied claim must be made within 90 days after receipt by the claimant of written notification of denial of the claim. However, the Trustees, in their discretion, for good cause (and the Trustees shall have the sole right to determine what shall constitute good cause) shall have the right and power to waive the 90 day limitation of time in which to make a request for review of a denied claim. Decision on appeal shall be made promptly and not later than 60 days after receipt of the request for review unless special circumstances require an extension of time for processing in which case a decision shall be rendered as soon as possible but not later than 120 days after receipt of request for a review. The decision on review shall be in writing and shall include specific reasons for the decision and specific references to the pertinent Plan provisions on which the decision is based.

ARTICLE XI
TRUST AGREEMENT

This Pension Plan shall be attached to and by this reference made a part of the Trust Agreement to which it is an Appendix.

NOTICE

All questions concerning the meaning and interpretation of this Pension Plan shall be addressed to the Board of Trustees. No one other than the Board of Trustees is authorized to give any information to any employee or beneficiary regarding the terms of the Plan. The Board of Trustees specifically disclaims any responsibility for the

accuracy of any information concerning this Plan given by anyone other than the Board of Trustees.

STATEMENT REGARDING INSURANCE OF BENEFITS

It is the belief of the Trustees that pension benefits are not and have never been guaranteed. They are payable only to the extent that the fund has assets to pay benefits. Neither your employer nor your union has assumed any liability, directly or indirectly, to provide monthly pension benefits. Your employer's sole obligation is to make the contributions called for in his collective bargaining agreement. The Pension Plan has always been considered by the employers, the union and the trustees to be a defined contribution plan.

Under ERISA defined contribution plans are not insured by the Pension Benefit Guaranty Corporation (PBGC). Such insurance applies only to defined benefit plans.

At the time of the publication of this booklet, further legislation is being considered which may bear upon the final determination as to whether benefits are insured.

Pending the final resolution of this issue, the Trustees of the Construction Laborers Pension Trust for Southern California continue to maintain that the pension fund is a defined contribution fund but nevertheless continue to pay, under protest, premiums required by the PBGC. If this fund is finally determined to be a defined benefit fund, then benefits under this plan may be insured by PBGC depending upon the provisions of any new legislation.

Generally, the PBGC guarantees most vested normal age retirement benefits, early retirement benefits, and certain disability and survivor's pensions. However, PBGC does not guarantee all types of benefits under covered plans, and the amount of benefit protection is subject to certain limitations.

The PBGC guarantees vested benefits at the level in effect on the date of plan termination. However, if a plan has been in effect less than five years before it terminates, or if benefits have been increased within the five years before plan termination, the whole amount of the plan's vested benefits or the benefit increase may not be guaranteed. In addition, there is a ceiling on the amount of monthly benefit that PBGC guarantees, which is adjusted periodically.

For more information on the PBGC insurance protection and its limitations, ask your Plan Administrator or the PBGC. Inquiries to the PBGC should be addressed to the Office of Communications, PBGC, 2020 K Street NW., Washington, D.C. 20006. The PBGC Office of Communications may also be reached by calling 202-254-4817.

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

Information required by the Act specified in Section 102(b).

1. Name and type of administration of the plan:

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA
Collectively Bargained, Jointly-trusteed Labor-Management Trust.

2. Name and address of person designated as agent for the service of legal process:

U.S. Administrators
3540 Wilshire Blvd.
Los Angeles, California 90010

Trustees
c/o U.S. Administrators
3540 Wilshire Blvd.
Los Angeles, California 90010
(213) 383-1100

3. Name and address of administrator:

See item 4 below.

The Trustees have engaged the independent contractor named below to perform the routine administration of the Trust:

U.S. Administrators
3540 Wilshire Blvd.
Los Angeles, California 90010

4. Name and address of Trustees:

BOARD OF TRUSTEES

GARY BRONNECK
1710 Santa Monica Blvd.
Santa Monica, CA 90404

SAL APARICIO
415 Chapala St. Room 203
Santa Barbara, CA 93101

R.C. GALLYON
3129 W. Burbank Blvd.
Burbank, CA 91505

MARCELINO DUARTE
1532 E. Chestnut Street
Santa Ana, CA 92701

ROBERT KRUSE
P.O. Box 308
(11300 Pendleton St.)
Sun Valley, CA 91352

JAMES KNIGHT
3919 Paramount Blvd.
Lakewood, CA 90712

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16802 Construction Way W.
Irvine, CA 92714

WILLIAM R. MC CLAIN
540 N. Marine Avenue
Wilmington, CA 96744

WILLIAM B. MIDDLETON
2641 River Avenue
Rosemead, CA 91770

JOHN SMITH
1074 La Cadena Drive
Riverside, CA 92501

AL MITCHELL
4507½ Sepulveda Blvd.
Sherman Oaks, CA 91403

JOHNNIE WILEY
P.O. Box 301
Bakersfield, CA 93302

DICK POZZO
3001 Coolidge Street
Los Angeles, CA 90039

RAY M. WILSON
3540 Wilshire Blvd. #910
Los Angeles, CA 90010

HARRY ROSS
7241 Ethel Avenue
North Hollywood, CA
91605

5. Name of Relevant Collective Bargaining Agreements:

So. Calif. Master Labor Agreement between the Southern California District Council of Laborers and its affiliated Local Unions together with other basic craft unions AND Associated General Contractors of California, Inc., Building Industry Association of California, Inc., Engineering Contractors Association and Southern California Contractors Association, Inc.

6. Sources of Contributions to the Plan:

Employer Contributions through Labor Agreement.

7. Funding Medium:

Trust through Employer Contributions.

8. How the Amount is Determined:

Labor Agreement.

9. Plan Fiscal Years Ends On:

December 31.

10. Employer I.D. No. Assigned for this Plan by IRS:

95-6031812

11. Plan Number:

001

RIGHTS UNDER ERISA

As a participant in the Laborers Pension Trust for Southern Calif., you are entitled to certain rights and

protections under the Employee Retirement Income Security Act of 1974. ERISA provides that all participants shall be entitled to:

> examine, without charge, at the Plan Administrator's Office all Plan documents, including insurance contracts, collective bargaining agreements and copies of all documents filed by the Plan with the U.S. Department of Labor, such as annual reports and Plan descriptions;
>
> obtain copies of all Plan documents and other Plan information upon written request to the Plan Administrator. The Administrator may make a reasonable charge for the copies;
>
> receive a summary of the Plan's annual financial report. The Plan Administrator is required by law to furnish each participant with a copy of this summary financial report;
>
> file suit in a federal court, if any materials requested are not received within 30 days of the participant's request, unless the materials were not sent because of matters beyond the control of the Administrator;
>
> no discrimination due to request for material;
>
> receive information as to whether a particular employer or employee organization is a sponsor of the Plan, and, if so, the address of such party;
>
> obtain a statement telling your whether you have a right to receive a pension at normal retirement age and if so, what your benefits would be at normal retirement age if you stop working under the Plan now. If you do not have a right to a pension the statement will tell you how many more years you have to work to get a right to a pension. This statement must be

requested in writing and is not required to be given more than once a year. The Plan must provide the statement free of charge.

If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or federal court. However you should first exhaust the Plan's claims and appeals procedures described elsewhere herein. If Plan fiduciaries misuse the Plan's money or if you are discriminated again for asserting your rights you may seek assistance from the U.S. Department of Labor or you may file suit in a federal court. The court will decide who should pay court costs and attorney's fees. If you lose the court may order you to pay costs and fees; for example, if it finds your claim is frivolous.

NOTICE

If you need assistance, please contact the Plan Administrator at the address shown.

Si ud necesita asistencia, por favor pongase en contacto con el Plan Administrator en la direccion aqui dada.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA

Review of

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

Copyright © by
Martin E. Segal Company, Inc.
December 1975

December 24, 1975

Board of Trustees
Construction Laborers Pension
Trust for Southern California
Los Angeles, California

Gentlemen:

This report sets forth the various alternatives available to you to bring your pension plan into compliance with the requirements of the Employee Retirement Income Security Act of 1974, effective January 1, 1976. These requirements deal with matters related to benefit eligibility and benefit amounts, such as participation, service credits, vesting, break rules, definition of normal retirement age, and joint and survivor annuities. In most cases the law allows various methods or formulas by which the plan can be brought into compliance. There is generally no single criterion or guideline available for choosing the appropriate method or formula. Your plan has its own special needs; policy and cost considerations have to be weighed in meeting those needs. We will, therefore, discuss each of the areas in which the plan must be amended, describing the several choices open to you and, where significant, indicating their effect on the cost of the program.

This report also describes the requirements with respect to funding and actuarial assumptions to be used in determining whether the funding standard is met. The cost of complying with the new eligibility and benefit requirements, under various alternatives and on a proper funding schedule, will be presented on the basis of such assumptions.

The report will not concern itself with questions of fiduciary responsibility, termination insurance, disclosure to employees, or government reports. These have probably already been discussed with you and will continue to be dealt with separately.

We look forward to reviewing this report with you at your scheduled meeting. At that time, we will discuss any questions the Board may have concerning this study.

Sincerely,

/s/ Roy Angelo
Roy Angelo
Senior Vice President

RA:BJP
cc: Legal Counsel
Administrator
Mr. Emil Matyas

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A. Vesting

One of the benefit changes you will be required to make is the adoption of a new vesting provision. The law gives you three alternative minimum standards outlined below.

1. 100% after 10 years of service.

2. 25% after five years of service, building up at the rate of 5% a year to 50% after 10 years, then at the rate of 10% a year to 100% after 15 years.

3. 50% after 10 years of service, or when the employee has at least five years of service and his age plus service totals 45, building up thereafter at the rate of 10% for each year of service to 100% five years later. Thus, an employee who starts earning service credits for vesting purposes at age 22 will be 50% vested 10 years later at age 32 and 100% at age 37; if he starts at age 27, he will be 50% vested nine years later at age 36 and 100% at age 41.

Under your present rule, an employee is 100% vested if he has completed 15 years of credited service. Any comparison between your present rule and the new requirement should take into consideration the fact that a "year of service" for the purpose of determining vested rights under the law is not the same thing as a year of service as defined in your present plan. Under the law, it is a plan year in which the employee worked at least 1,000 hours. If you wish to retain the present 1,200 hour requirement for a year of service in benefit calculations, the plan will have to make a distinction between a year of service for vesting purposes and a year of service for the accrual of benefits. Thus, an employee who works 1,000 but less than 1,200 hours in a year would get a year of credit

towards meeting the vesting test but less than a year of credit in the calculation of his pension.

As to the choice of vesting alternatives, the 10-year rule is the easiest to explain and, administratively, the easiest to handle. Since records must be kept on file for all employees who leave the industry with any vested right to a future pension, fewer records will accumulate under that rule than under either of the other two. Finally, it should be noted that if a 25% or 50% vested right can be earned after only five years of service at a relatively young age, many employees will be receiving, many years after they leave the industry, amounts which will then have only negligible value because of inflation.

B. Break rules

Your present plan provides for a break in service if an employee fails to earn one quarter of service credit in two consecutive calendar years. In 1976 this will have to be changed to a rule no stricter than the following:

1. A plan year in which a participant fails to complete more than 500 hours of service will be a one-year break in service. (The Labor Department will issue regulations governing the definition of an hour of service for the purpose of the law.)

2. If a participant who has not yet acquired a vested right to a deferred pension has a number of consecutive one-year breaks in service equal to the number of years of vesting service, his credit for those years and also for his years of benefit service will be cancelled.

For example, if an employee completes two plan years of 1,000 hours each and fails to work more than

500 hours in each of the next two years, his prior service credits may be cancelled. If he returns to the industry after that, it must be as a new employee. In this case, the law allows a stricter rule than is now applicable. On the other hand, if he completes four plan years of 1,000 hours each, is out of the industry for the next three years, and returns to work for 501 hours in the fourth year, his earlier credits for both vesting eligibility and benefit accrual must be preserved. In this case, the new law requires you to be more liberal.

You may wish to continue the old rule along with the new one you will write and thereby combine the liberal aspects of both. A decision to follow this course should take into account, not only the added cost, but also the added problems of administering the plan and explaining its provisions. On the other hand, you may go in the other direction and, not only discard the old rule when the law requires the new one to become effective, but until then tighten the old rule by adding the stricter aspects of the new one. For example, you could cancel all credits for any non-vested employee for whom 1975 is a one-year break, unless and until he works 1,000 hours in some later year. Otherwise, it would be possible for an employee who worked 1,000 hours in each of 1971, 1972, 1973, left the industry, but did not yet incur a break in service, to make a claim at the beginning of the 1976 plan year for all previous credits, which should then give him a vested right under the new rules.

Our studies were limited to an application of the strict ERISA rule and a comparison with the cost based on the present two-year rule. The Administrator required more time to provide termination data

based on a modified break rule providing the liberal aspects of the old rule and the ERISA rule.

C. Normal retirement age

Fixing a normal retirement age is important because, regardless of the vesting rule adopted and regardless of his service, the plan will be required to grant a fully vested benefit to an employee who retires after he reaches the age. Thus, your present eligibility test of 15 years of benefit accrual for a pension will have to be dropped for an employee who works to retirement age. We, therefore, suggest that you take advantage of a provision in the law which permits you to define normal retirement age as the later of age 65, or the age on the 10th anniversary of the employee's participation in the plan. In line with this suggestion and the present provisions, the amount of the Early Retirement Pension would be the same as for a Normal Pension based on the number of pension credits, if the employee retires after the age of 62 and before age 65 with at least 15 years of pension credit (or 10 years participation under a proposed change of the vesting provision discussed in Section A of this report).

D. Beginning date of pension

An employee is required under the pan to file an application in advance of his retirement date. This means that, if he leaves the industry at age 65 and for some reason does not file an application until some time later, some potential benefits are forfeited. Under the law, there will be a limitation on the number of pension payments that may be forfeited, regardless of how long an application is delayed. Payments must begin (if necessary, retroactively) no later than two months after the close of the plan year in which the employee reached his normal retirement age or, if later, the year in which he last worked in

the industry, trade, and geographic area covered by the plan. The plan rule about the beginning date of the normal pension will therefore have to be revised. No change will be required in the case of disability or early retirement.

E. Suspension of Benefits

The law permits a plan to suspend pension payments only if the retired employee resumes work in the same industry, trade, and geographic area. The law does not specify just how much employment constitutes a return to work or define the limitations of industry, trade, or geographic area. How and to what extent it will be necessary to revise the present provision regarding the employment of a pensioner will not be clear until regulations are issued. The subject will therefore have to be reviewed at a later date.

F. Lump-sum settlements

It is likely that a number of participants will qualify for relatively small Pro Rata Pensions. The law permits you to discharge a pension liability by means of a lump-sum settlement if the actuarial value of the lifetime payments is not more than $1,750. The Trustees may find it advisable, administratively and otherwise, to utilize this provision. It may be possible to make larger settlements, if the employee consents, under conditions that are still to be spelled out in regulations. If you adopt one of the graded vesting rules and make a lump-sum settlement to an employee who is less than 100% vested, you will have to allow him to repay the lump-sum (with interest) if he ever returns to covered employment.

G. Joint and Survivor annuities

The present plan provides a Widow's Pension to the surviving spouse of members whose death occurs prior to retirement and after attainment of age 55 and

the accumulation of 15 years credited service. The amount of the Widow's Pension is equal to 50% of the member's benefit assuming

* * *

MINUTES

CONSTRUCTION LABORERS PENSION TRUST

FOR SOUTHERN CALIFORNIA

BOARD OF TRUSTEES

February 10, 1976

U.S. ADMINISTRATORS
8383 Wilshire Boulevard
Beverly Hills, California

ATTENDANCE

Management Trustees	Union Trustees
James H. Crowell	Sal Aparicio
R. C. Gallyon	David Hernandez
C. Irwin T. Johnson	James Knight
Paul Kral	William R. McClain
Robert Kruse	Manuel Renteria
William B. Middleton	John Smith
Reed Sprinkel	Edgar A. Watkins
	Ray M. Wilson
Attorney	**Consultant**
James Wolf	Emil Matyas
Administrative Office	**Lionel D. Edie & Co.**
Samuel X. Kaplan	Robert Genthe
C. L. McCartney	**Union Bank**
W. O. Ramey	Frank Barlot
	Gary Morris

I. CALL TO ORDER

The meeting was called to order by Chairman Ray M. Wilson at 9:56 A.M.

II. MINUTES OF PREVIOUS MEETINGS

* * *

VI. ATTORNEY'S REPORT

C. Final Action on Proposed Amendment No. 52 (Attached)

Mr. Wolf stated that the two changes incorporated in the proposed amendment were recommended to the Trust by Roy Angelo at the last special meeting of the Board of Trustees. He stated that he and Mr. Matyas have prepared the appropriate language and the proposed amendment is now ready for final action.

Mr. Wolf stated that the definition of participant is primarily for the purpose of enabling a calculation of the premium paid to the Pension Benefit Guarantee Corporation. The definition of normal retirement age is also put in pursuant to ERISA and primarily for the purpose that under the new law a man is entitled to his pension benefits when he reaches normal retirement age whether he applies or not. He stated that if a man applied for his pension several years after his normal retirement age, a retroactive payment must be made back to the normal retirement age of that time.

Mr. Wolf stated that in the past, the Trust has paid back only to the time of the man's application for his pension. Mr. Wolf explained that this change does not affect early retirement or what should now be called regular retirement at age 62. Mr. Wolf stated that this does not affect the man who remains active until an age after the normal retirement age.

Mr. Wolf stated that he is in the process of revising the Pension Plan and expects to have a draft in Mr. Matyas' office for his review and which will ultimately be submitted to the Trustees for their review

and approval. He stated that as part of this revision he is changing the word normal retirement as previously used by the Pension Trust to regular retirement at 62. Normal retirement will only refer to the definition as contained in this amendment and explained above.

Mr. Wolf stated that there are other very technical phases of the law which in the opinion of Mr. Angelo, Mr. Matyas and himself makes this change desirable. He stated that it will not affect the plan adversely. It was also noted that it will not adversely affect the man who makes his application as soon as he is eligible.

Mr. Wolf stated that an example of another phase which this change would affect is the joint survivor benefit. He stated that under the new law the Trust must offer the joint survivor benefit to a man ten years before his normal retirement age. He stated that this would mean that the Trust would be obligated to contact the participants at age 52 to inform them of the joint survivor benefit election if the normal retirement age as defined by ERISA remained at 62.

Mr. Wolf reiterated that this change will not affect the basic program in regard to a man receiving full benefits at age 62.

After further discussion of this matter, the following action was taken:

* * *

MINUTES
CONSTRUCTION LABORERS PENSION TRUST
FOR SOUTHERN CALIFORNIA
BOARD OF TRUSTEES

October 12, 1976

U.S. ADMINISTRATORS
8383 Wilshire Boulevard
Beverly Hills, California

ATTENDANCE

Management Trustees

James Crowell
R. C. Gallyon
C. Irwin T. Johnson
Paul Kral
Robert Kruse
William B. Middleton
Reed Sprinkel

Union Trustees

David Hernandez
James Knight
William R. McClain
Manuel Renteria
John L. Smith
Edgar W. Watkins
Ray M. Wilson

Attorney

James Wolf

Consultant

Emil Matyas

Administrative Office

Samuel X. Kaplan
C. L. McCartney
Raul L. Perez

Lionel D. Edie & Co.

Robert Genthe
C. M. McMahon

Union Bank

Gary Morris

I. CALL TO ORDER

The meeting was called to order by Chairman James H. Crowell at 9:08 A.M.

II. APPOINTMENT OF NEW TRUSTEE

* * *

C. Second Reading of Proposed Amendment to Trust Plan Number 54 (attached).

Mr. Wolf explained the reason for this proposed amendment. He stated that occasionally a pension application which is made out in October does not reach the administration office until November and in that event the man's pension does not start until December causing the applicant to feel that he has been deprived of one month's pension.

Mr. Wolf stated that this amendment is designed to give a 15 day leeway so that in the event a pension application is signed in one month and is received by the administration office by the 15th of the following month the pension will have the effective date originally requested by the pensioner of that following month. Mr. Wolf stated that simplification of the explanation of this entire amendment is that in essence it is only providing a 15 day leeway for a pension application to reach the administration office.

Mr. Gallyon asked what the present rule is and Mr. Wolf explained that the present rule is that a pension begins the first day of the month following the month in which the pension application is received by the administrative office.

After much further discussion the following action was taken.

MOTION made, seconded, and carried to approve adoption of amendment 54 to the Trust Plan with an effective date of October 1, 1976.

Mr. Perez asked how this will apply to reciprocity pensions. He stated that this office has to depend on

the day an application was received by the initial pension office with whom reciprocity is being applied. Mr. Wolf stated that the Trust should take the date of application from the office from which the reciprocity pension application was received, even if this is an earlier date than when the application is received at this office.

D.

* * *

STATUTORY PROVISIONS

Act Sec. 404. (a)(1) Subject to sections 403(c) and (d) 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

Act Sec. 502. (a) A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his

rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

Act Sec. 503. In accordance with regulations of the Secretary, every employee benefit plan shall –

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

Act Sec. 302.

(a) **Payment or lending, etc., of money, by employer or agent to employees, representatives, or labor organizations**

It shall be unlawful for any employer or association of employers or any person who ace [sic] as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value –

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

* * *

(c) **Exceptions**

The provisions of this section shall not be applicable (1) . . .

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents); *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such

deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the result of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities;

(e) **Jurisdiction of courts**

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

Supreme Court, U.S.
FILED
FEB 12 1997
CLERK

No. 96-1097

In The

Supreme Court of the United States

October Term, 1996

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA; and BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, individually and in their official capacity,

Petitioners,

vs.

MARIO CANSECO, JAMES DANIELS, MANUEL DELGADO, JESSIE RILEY, and CORSE WHITEHURST, JR., individually and on behalf of all those similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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29 pp

QUESTIONS PRESENTED

Respondents-Plaintiffs restate the Questions in the Petition as follows:

1. Whether 29 U.S.C. § 1144(b)(1) – which provides that ERISA does not preempt "any cause of action which arose, or any act or omission which occurred, before January 1, 1975" – bars ERISA jurisdiction over an action arising from a denial of full pension benefits for a retiree who failed to apply for them on his 62nd birthday, where the benefits were denied pursuant to a post-ERISA pension plan and both the failure to apply at age 62 and the pension denial occurred after 1975.

2. Whether the Ninth Circuit correctly applied principles of the federal common law of employee benefit plans which it and other circuit courts have developed, as instructed by this Court, when it held that Petitioners-fiduciaries abused their discretion by interpreting their pension plan contrary to its unambiguous terms.

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To The Honorable Supreme Court:

The Respondents, Mario Canseco, et al., respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Ninth Circuit's decision in this case. That decision is reported at 93 F.3d 600 (9th Cir. 1996) and is reprinted at pages 1-23 in Petitioners' Appendix.

STATEMENT OF THE CASE

Respondents ("Retirees") incorporate the "Factual and Procedural History" in the opinion below, *Canseco v. Construction Laborers Pension Trust for Southern California*, 93 F.3d 600, 602-605 (9th Cir. 1996), Pet. App. at 3-9.[1] However, because Petitioners ignore crucial facts – particularly regarding the dates relevant to named plaintiff Mario Canseco's claim and regarding the language of the governing plan instrument of the Construction Laborers Pension Trust for Southern California ("CLPT") – Retirees will summarize the facts as to those matters.

In 1975, plaintiff Canseco, then 56, became disabled and was unable to continue his nearly 30-year career as a construction laborer. The earliest age at which he could have been eligible to receive benefits under the CLPT

[1] Throughout this Opposition, the following abbreviations are used: "Pet. App." (Appendix attached to Defendants' Petition); "ER" (Appellants Excerpts of Record filed with the Ninth Circuit); "Supp. ER" (Appellees' Supplemental Excerpts of Record filed with the Ninth Circuit).

Plan was age 62; however, 15 years of service were necessary for such a "Regular Retirement" benefit. Pet. App. at 75. At the time, CLPT records erroneously indicated that he did not have the 15 years of credited service. 600 F.3d at 602, Pet. App. at 3. Given his belief that he lacked the requisite 15 years, Canseco did not apply for benefits in 1981, when he turned 62. 600 F.3d at 602-603, Pet. App. at 3-4. In 1987, pursuant to a judgment in a class action lawsuit,[2] Canseco received notice that he might be eligible for benefits based on new eligibility rules which required only 10 years of credited service. 600 F.3d at 603, Pet. App. at 4. He began receiving such benefits, but the CLPT subsequently determined that he should have been credited with almost 23 years of service before his disability; i.e., he had been eligible for Regular Retirement benefits of $988 per month in 1981 (at age 62). Nevertheless, the CLPT's Board of Trustees ("Trustees") "refused to pay him benefits retroactive to that date because – applying nearly perfect *Catch*-22 logic – he had failed to apply for them." *Id.* The CLPT awarded benefits retroactive to March 1, 1985 (based on plan provisions requiring payment no later than the March 1 of the year following the participant's 65th birthday), but not for the more than 4 years from Canseco's 62nd birthday in January, 1981 to March 1, 1985. *Id.*

At all relevant times, Article 2 of the CLPT plan, entitled "Eligibility for Retirement Benefits" provided

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[2] *Ponce v. Construction Laborers Pension Trust for Southern California*, 582 F. Supp. 1310 (C.D.Cal. 1984), *aff'd*, 774 F.2d 1401 (9th Cir. 1985), *cert. denied*, 479 U.S. 890, 107 S.Ct. 289, 93 L.Ed. 2d 263 (1986).

"three alternative plans" pursuant to which CLPT participants could "attain eligibility for retirement on a 'Regular Pension.' " 600 F.3d at 604, Pet. App. at 7. Section 2.02 stated that "[a]n employee *shall be entitled* to retire on a Regular Pension under this Plan if he satisfies all of the requirements of one of the following plans. . . . " *Id.*; emphasis supplied. The relevant plan, Plan Two, set forth three and *only three* requirements: (1) 15 years of credited service; (2) age 62; and (3) a minimum amount of covered employment after contributions were first made for the employee. Nowhere in Plan Two or anywhere in Article 2 of the CLPT plan was any additional eligibility requirement stated. *Id.*

Article 5 of the CLPT Plan was entitled "Payment of Benefits." In relevant part, it stated that "[a]n employee who meets the conditions for eligibility set forth herein shall, upon approval of an application submitted to the Board, become entitled to Pension Benefits under the Plan." 600 F.3d at 604, Pet. App. at 8-9. Later in Article 5, the CLPT plan provided that payment of benefits would commence at the beginning of the calendar month following submission of an application for benefits. *Id.*

As stated above, the Trustees determined that notwithstanding the clear language in Article 2, which set forth "eligibility" requirements, the "application" provision, set forth in Article 5, constituted a condition of eligibility. Retirees challenged this determination under several different theories. The district court held that it had jurisdiction under ERISA, but granted summary judgment for Defendants-petitioners on, *inter alia*, plaintiffs' first three claims for relief, and denied Retirees' cross-motion on those same claims. Pet. App. at 42-44.

The Ninth Circuit upheld the district court's jurisdiction, but reversed the summary judgment order. The Ninth Circuit held that the unambiguous language of the CLPT plan required that the Petitioners pay benefits to plaintiff Canseco and other class members retroactive to their 62nd birthdays. Consistent with all other circuits which have addressed the issue, the Ninth Circuit held that even under the deferential standard of review required by *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989), it was an abuse of discretion for the Trustees to interpret the CLPT plan contrary to its plain and unambiguous language. Accordingly, the circuit court directed the entry of judgment for Retirees on their claim of entitlement to benefits pursuant to the terms of the CLPT plan.[3]

REASONS FOR DENYING THE WRIT

Although they argue that there are conflicts on two questions, Petitioners fail to satisfy any of the criteria traditionally applied by the Court in determining whether to grant a Writ of Certiorari.

[3] The Ninth Circuit did not address the Retirees' other claims – that the Trustees' actions violated ERISA's fiduciary duty and non-forfeitability provisions. 600 F.3d at 604, Pet. App. at 6.

First, this case is not the appropriate vehicle for the Court to clarify ERISA's arguable exclusion from its purview of "any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. §1144(b)(1). Here, all of the potentially relevant acts and omissions took place after that date. Thus, there is no real, present or intolerable conflict as to this issue.

Second, there is no conflict at all between the Ninth Circuit and either this Court or any other circuit regarding the standard of review to be applied to fiduciaries' interpretations of employee benefit plans. To the contrary, the Ninth Circuit, following this Court's dictates and consistent with other circuits, held that it is an abuse of discretion to interpret a plan contrary to its plain meaning.

A. THE COURT SHOULD DECLINE REVIEW OF THE JURISDICTIONAL ISSUE RAISED BY PETITIONERS BECAUSE UNDER ANY POTENTIALLY APPLICABLE STANDARD, ERISA JURISDICTION IS PROPER, AND BECAUSE THE ISSUE PRESENTED AFFECTS AN EVER-DWINDLING POPULATION.

The Trustees ask this Court to resolve an inter-circuit conflict concerning the scope of ERISA jurisdiction over pension plans adopted before 1975. Petition at 6-11. The purported conflict, however, has little relevance to this case. The Court's "function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184, 79 S.Ct. 710, 713, 3 L.Ed. 2d 723 (1959). "If the resolution of a clear conflict is irrelevant to

the ultimate outcome of the case before the Court, certiorari may be denied." Robert Stern, Eugene Gressman, Stephen Shapiro and Kenneth Geller, *Supreme Court Practice*, §4.4 at 173 (7th ed. 1993).

While there are differences among the courts of appeal concerning the scope of ERISA jurisdiction, those differences would not affect the outcome of this case. Under any of the circuits' approaches, ERISA jurisdiction is proper here.

The jurisdictional issue concerns 29 U.S.C. §1144(b)(1), which provides that the section of ERISA governing preemption does "not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." Most courts of appeals have held that this provision not only governs preemption, but also precludes ERISA jurisdiction over litigation concerning pre-1975 causes of action or acts or omissions. *See, e.g., Stevens v. Employer-Teamsters Joint Council*, 979 F.2d 444, 450 (6th Cir. 1992), and cases cited therein.[4]

As the Trustees point out, there are differences among the circuits concerning what constitutes an "act or omission which occurred, before January 1, 1975." 29 U.S.C. §1144(b)(1). However, all conceivably significant acts and omissions here – the denial of Mr. Canseco's pension benefits, the failure of Mr. Canseco to apply for

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[4] This conclusion is not unanimous. *See Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49, 51 (3d Cir. 1985) ("the preemption provision is concerned with the effect of ERISA on other laws and does not define the bounds of federal jurisdiction").

benefits when he turned 62, and even the adoption of the relevant plan on which the Ninth Circuit's decision was based – occurred after 1975. Under any circuit's approach for determining ERISA jurisdiction, jurisdiction lies in this case.

The Third and Fourth Circuits have held that "the trustees' act in denying a pension application" is "an act or omission which is subject to ERISA." *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989), citing *Tanzillo v. Loc. U. 617, Intern. Bro. of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985). *See also, Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970 (5th Cir. 1981) ("a cause of action arising after January 1, 1975, is an ERISA claim even though it may be founded in part on earlier occurrences"). Under the rule announced in these cases, of course, ERISA jurisdiction lies here. The Trustees denied the pension benefits sought by lead plaintiff Canseco more than 12 years after ERISA became effective. 600 F.3d at 603, Pet. App. at 4-5.

The Trustees rely upon several circuit court opinions which concluded that even when a denial of benefits occurs after 1975, "ERISA does not apply if the denial of benefits is based on an act or omission that occurred before the effective date of ERISA." *Stevens v. Employer-Teamsters Joint Council, supra*, 979 F.2d at 452.

Stevens, the case primarily relied upon by the Trustees (Petition at 7-10), concerned a "break in service" provision in a pension plan requiring consecutive years of covered employment. From 1961 to 1966, plaintiff Stevens worked for an employer who failed to make required contributions to Stevens' pension plan. *Id.* at 447. Stevens applied for pension benefits in 1980, and was

denied because of the employer's failure. *Id.* at 448. The district court held that ERISA jurisdiction did not lie, and the Sixth Circuit affirmed, rejecting the claim that a post-1975 denial of benefits was sufficient to trigger ERISA jurisdiction.

At the same time, however, the Sixth Circuit rejected the district court's conclusion that the act or omission which gave rise to the claim was the *adoption* of the break in service provision. *Id.* at 455. Rather, the court found that "the relevant acts or omissions are those that relate specifically to Stevens and form the basis of [the pension plan's] decision to deny him service credit for the 1958-1966 period. In this case, the relevant acts or omissions were [the former employer's] failure to make pension contributions on Stevens' behalf, as was required by the collective bargaining agreement." *Id.* Thus, *Stevens* rejects the very proposition that the Trustees appear to urge here: that there is no ERISA jurisdiction if the rule in question was first adopted prior to ERISA.

Similarly, although the courts have articulated different approaches, in virtually all of the cases in which ERISA jurisdiction has been denied, the pension denials were based on pre-1975 acts or omissions by *the claimants* or on things that were told to *the claimants*. *See, e.g., Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1502 (9th Cir. 1984) (plaintiff was told in 1967 that if he resigned his job that year he would lose his credits); *Quinn v. Country Club Soda Co., Inc.*, 639 F.2d 838 (1st Cir. 1981) (plaintiff was told in 1960 that he was ineligible for the profit-sharing plan in question; *LaMontagne v. Pension Plan of the United Wire, Metal & Machine Pension Fund*, 869 F.2d 153, 154-55 (2d Cir.), *cert. denied*, 493 U.S. 818 (1989)

(pension denial based on employee's failure to work at least 800 hours in covered employment beginning in 1971).

Even if the rule in *Stevens* was to be applied to this case, ERISA jurisdiction would still be proper. Mr. Canseco was denied full benefits because he failed to submit an application when he turned 62 in 1981, six years after ERISA became effective. 600 F.3d at 603, Pet. App. at 5.

The Trustees apparently contend, nonetheless, that the relevant "act or omission" is the pre-1975 adoption of the CLPT plan. However, those courts that have relied upon the pre-1975 adoption of a plan have done so only "in cases where a claimant is formally denied benefits after ERISA's effective date pursuant to [1] an unambiguous and nondiscretionary plan provision [2] adopted before the effective date. . . . " *Menhorn v. Firestone Tire & Rubber Co., supra,* 738 F.2d at 1501; *accord, LaMontagne v. United Wire, Metal & Mach. Pension F., supra,* 869 F.2d at 156 ("the denial of the pension application followed inexorably from the pension fund's pre-1975 adoption of its break in employment policy"). In contrast, the CLPT plan at issue here was adopted after ERISA's effective date, and it did not *unambiguously* deny full benefits.

In this case, benefits were denied pursuant to a post-ERISA plan. In 1976, "the Trustees modified the CLPT plan pursuant to ERISA requirements." 600 F.3d at 604, Pet. App. at 7, n.5. *See also,* Supp. ER at 45 (CLPT plan restated and substantially revised). The plan was modified again in May of 1979, and it was the 1979 plan "which was in effect at the time of the relevant actions by the CLPT Trustees." 600 F.3d at 604, Pet. App. at 7, n.4.

See also, ER at 116. Indeed, in the lower courts, the Trustees argued that they adopted their post-ERISA restated plan with the intent of ensuring that retirees like Mr. Canseco would be deprived of benefits despite the enactment of ERISA's non-forfeitability clause (29 U.S.C. §1053). (*See* Answering Brief of Appellees [in the 9th Circuit] at 7-8.) Consequently, unlike in *Menhorn* and *LaMontagne,* the issue before the Ninth Circuit here was a post-ERISA interpretation of a post-ERISA plan.

Equally important, claimants here were not denied benefits "pursuant to an unambiguous and nondiscretionary plan provision." *Menhorn, supra,* 738 F.2d at 1501. Where, as in this case, the language of the plan itself does not unambiguously support denial of the claim, courts have held that the key "act or omission" is the application of the plan to the plaintiff. *See, e.g., Bolton v. Construction Laborers' Pension Trust,* 56 F.3d 1055 (9th Cir. 1995). In *Bolton,* the plan (the same CLPT plan at issue in this case) included a break in service rule. The Ninth Circuit held that "the 'act or omission' at issue occurred in 1987 when the Plan's break-in-service rule was applied to [the claimant]. . . . we find that the Plan's 1987 decision to apply the break-in-service rule to [the claimant] without determining whether his break was voluntary was a 'significant act of . . . interpretation of the plan.' " *Id.* at 1058 (citation omitted).

Similarly, in *LaMontagne, supra,* the second Circuit held that there was no ERISA jurisdiction over the issue of whether a pre-ERISA plan provision violated the statute. However, the court did *not* dismiss on jurisdictional grounds a claim that the benefit denial violated the plan itself. 869 F.2d at 157.

In this case, even assuming that the CLPT plan was adopted before 1975, the Trustees cannot reasonably argue that the plan *unambiguously* precludes full benefits for those retirees failing to apply on their 62nd birthdays. In fact, the Ninth Circuit found that the opposite conclusion was compelled by "the plain language of the CLPT plan . . . ." 600 F.3d at 609, Pet. App. at 20. The Trustees' application of the plan to the Retirees, not the enactment of the plan itself, was the significant "act or omission".

Nor is there any legal significance to the Trustees' assertion that they interpreted the predecessor CLPT plans the same way. Petition at 10. Pre-1975 interpretations have been found to be "acts or omissions" under ERISA only when those interpretations have been communicated to the claimant. *See, e.g., Quinn v. Country Club Soda Co., Inc., supra,* 639 F.2d at 840-41 (relying on the fact that the claimant was consistently told from the time he was hired in 1960 he would not be eligible for participation in a profit-sharing plan); *accord, Menhorn v. Firestone Tire and Rubber, supra,* 738 F.2d at 1502 (substantial acts giving rise to cause of action occurred when the claimant "was told [in 1967] that his resignation would terminate his service credits").[5] In this case, the Trustees did not even claim that the interpretation at issue was communicated to Mr. Canseco and other retirees before 1975.

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[5] The *Quinn* court cautioned: "We by no means suggest that a trustee's mere interpretation of the terms of a pension plan . . . would in any and all circumstances constitute 'significant facts' that, having occurred prior to January 1, 1975, would bar suit under ERISA based on a post-1975 denial of benefits." 639 F.2d at 841, n.2.

In short, none of the circuits has adopted a rule which would result in a denial of jurisdiction here. Under any of their approaches, the triggering "act or omission" would be either Mr. Canseco's failure to apply for benefits when he turned 62, which occurred in 1981, or the Trustees' refusal to pay full benefits, which occurred more than six years later. The purported conflict among the circuits is at best, academic here, and does not merit review.

Certiorari should also be denied because the jurisdictional question is becoming increasingly less important with the passage of time. As discussed above, in virtually every case in which ERISA jurisdiction has been rejected, the pension denial was based on a pre-1975 act or omission by the claimant. Often, this act or omission took place near the end of the claimant's career. *See, e.g., LaMontagne,* 869 F.2d at 154 (claimant hurt his back and incurred a " 'break in employment' " after 17 years on the job). Obviously, as the years go by, there will be fewer and fewer retirees denied pensions because of something they did or did not do before 1975. In the 23 years ERISA has been in effect, this Court has not seen fit to review the jurisdictional issue raised in the Petition. There is even less reason to do so now.

B. The Ninth Circuit Correctly Applied the Federal Common Law Principle That It Is an Abuse of Discretion For a Fiduciary to Interpret the Terms of an Employee Benefit Plan Contrary to Their Plain Meaning, a Principle as to Which There Is No Conflict Among the Circuits.

1. The Ninth Circuit Followed the Dictates of *Firestone Tire & Rubber Co. v. Bruch* and Applied Principles of the Federal Common Law Applicable to Employee Benefit Plans.

The Ninth Circuit found that Petitioners' interpretation of the written instrument governing the CLPT plan was an abuse of discretion because it was contrary to the unambiguous meaning of the plan. 93 F.3d at 606-07, Pet. App. at 12-16. The court found that the plan clearly set forth all of the requirements for benefit eligibility, and that those conditions did *not* include the requirement of an application, which was set forth in a separate part of the plan governing receipt of benefits by those who "*already* 'meet[ ] the conditions of eligibility.' " *Id.* at 606, Pet. App. at 14; emphasis in original.

In seeking review of this straightforward holding on the facts of the case, Petitioners attempt to manufacture a conflict between the Ninth Circuit and other circuits or this Court. However, Petitioners distort this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989), and ignore the circuit courts' consistent holdings that it is an abuse of discretion to interpret an employee benefit plan contrary to its plain language.

In *Firestone*, the Court stated that where a plan grants "discretionary authority to determine eligibility for

benefits or to construe the terms of the plan," a court must review for abuse of discretion the challenged benefit decisions of plan administrators and other fiduciaries. *Id.*, 489 U.S. at 115, 109 S.Ct. at 956-57, 103 L.Ed. 2d at 956-57. Here, the Ninth Circuit recognized that the CLPT plan conferred such discretionary authority upon the Trustees. 93 F.3d at 605, Pet. App. at 10-11.

This Court further stated in *Firestone* "that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.' " 489 U.S. at 110, 109 S.Ct. at 954, 103 L.Ed. 2d at 954 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56, 107 S.Ct. 1549, 1558, 95 L.Ed. 2d 39 (1987)). Citing *Firestone* and *Pilot Life*, the Ninth Circuit prefaced its analysis in *Canseco* by stating that it would apply several common law principles developed by the federal courts. *Canseco*, 93 F.3d at 606, Pet. App. at 12. It then applied two such interpretive principles – "[t]he plain language of the plan" and "[t]he disfavoring of implied terms" (93 F.3d at 606, 608, Pet. App. at 12, 18).

Addressing the first of these principles, the Ninth Circuit stated:

> We have consistently explained that "trustees abuse their discretion if they . . . construe provisions of [a] plan in a way that clearly conflicts with the plain language of the plan."

93 F.3d at 606, Pet. App. at 12-13; (citation omitted).

The Ninth Circuit then applied this principle by examining the provisions of the CLPT Plan governing benefit eligibility and payments. Considering the language of the individual provisions and the structure of

the plan as a whole, the court concluded that the trustees' interpretation entirely lacked support in the plan itself:

> Nowhere does the CLPT plan provide that an employee's failure to submit an application for benefits will result in the retroactive loss of benefits for which that employee is eligible.

93 F.3d at 607, Pet. App. at 15. Indeed, the Court of Appeals found that the trustees' interpretation would "strip [the benefit eligibility provision] of its meaning." 93 F.3d at 607, Pet. App. at 16.

The Ninth Circuit then applied a closely related "second interpretive principle" of federal common law – that "pension plan trustees . . . may not construe a plan so as to impose an additional requirement for eligibility that clashes with the terms of the plan." 93 F.3d at 608, Pet. App. at 18. Again, this principle "disfavoring . . . implied additional terms" (*Id.*) was nothing new. *See, e.g., Saffle v. Sierra Pacific Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455, 458 (9th Cir. 1996).

In *Canseco*, the court applied this principle as follows:

> By retroactively denying benefits to a class of workers who have indisputably earned them, the Trustees have, in effect, imposed on those workers an additional requirement of eligibility: the submission of an application for benefits. We reject such an additional requirement as inconsistent with the terms of the CLPT plan, since nothing in the CLPT makes an application a prerequisite for eligibility.

93 F.3d at 609, Pet. App. at 20.

The Ninth Circuit concluded that the CLPT application requirement, which was set forth in a portion of the CLPT plan relating to procedures to be followed to obtain benefits, rather than in the part of the plan containing eligibility requirements, could not "override the CLPT plan's mandate that an employee who 'satisfies all of the requirements' of eligibility 'shall be entitled to retire on a Regular Pension under this Plan[.]' " *Id.*

Thus, because the Trustees' interpretation of the CLPT Plan "clearly conflicted with its plain language" (*Id.*), the Trustees acted arbitrarily and capriciously (i.e., abused their discretion).[6]

2. Like the Ninth Circuit, All Other Circuits Which Have Addressed the Issue Have Found That It is An Abuse of Discretion to Interpret An Employee Benefit Plan Contrary to Its Plain and Unambiguous Meaning.

Petitioners claim that there is a split among the circuits after *Firestone* as to the standard applied in reviewing fiduciaries' interpretations of ERISA-regulated employee benefit plans. This is simply incorrect. In fact, the Third, Fourth, Sixth, and Seventh Circuits apply the same federal common law principles as the Ninth Circuit

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[6] Like most circuits after *Firestone*, the Ninth Circuit has held that where the governing plan instrument gives rise to a deferential standard of review, that standard is the same as the "arbitrary and capricious" standard of review used frequently prior to *Firestone*. *See Eley v. Boeing Co.*, 945 F.2d 276, 278 n.1 (9th Cir. 1991); *Taft v. Equitable Life Assurance Society*, 9 F.3d 1469, 1471 n.2 (9th Cir. 1993).

applied in *Canseco*. The Fifth and Eighth Circuits apply similar standards. No circuits apply contrary interpretive rules.

The Third Circuit has held that even where a plan document vests in the plan administrator the discretion to interpret terms (i.e., where *Firestone* requires application of an abuse of discretion standard), an "interpretation may not controvert the plain language of the document. . . . Extrinsic evidence may be used to determine an ambiguous term; however, it is inappropriate to consider such evidence when no ambiguity exists." *Epright v. Environmental Resources Management, Inc., Health and Welfare Plan*, 81 F.3d 335, 339 (3d Cir. 1996) (citations omitted).

Similarly, the Fourth Circuit has noted in applying the deferential standard of review that "[i]f the plan language is unambiguous . . . we would not defer to a contrary interpretation. . . . " *Davis v. Burlington Industries, Inc.*, 966 F.2d 890, 895 (4th Cir. 1992).[7]

The Sixth Circuit also has held that in determining whether a fiduciary has abused its discretionary authority, "the most important factor to weigh is the language of the plan itself as known by the employees, or as the employees should have known." *Callahan v. Rouge Steel*

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[7] The Fourth Circuit case cited by Petitioners does not stand for a different proposition. In *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1187 (4th Cir. 1989), the Fourth Circuit (misidentified by Petitioners as the Eighth Circuit), was faced with "nothing more than a dispute over the . . . trustees' 'interpretations' of *unclear language* found in the plan documents. . . . " Emphasis supplied.

Co., 941 F.2d 456, 460 (6th Cir. 1991). Once a qualifying condition is triggered under the plain language of the plan, the court does "not need to look any further to" extrinsic evidence. *Id.* at 461. In *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 1996 WL 731710 at 4 (7th Cir. 1996), the Seventh Circuit recently reaffirmed its view that "if fiduciaries or administrators of an ERISA plan controvert the plain meaning of a plan, their actions are arbitrary and capricious."

Although the Eighth and Fifth Circuits apply multi-factor tests in all cases,[8] they place great reliance on the plain language of the plan. Thus, the Eighth Circuit gives "significant weight . . . to . . . a misinterpretation of unambiguous language in a plan." *Lickteig v. Business Men's Assurance Co. of America*, 61 F.3d 579, 585 (8th Cir. 1995).[9]

Similarly, in determining whether a trustee's interpretation of a plan constitutes an abuse of discretion, the Fifth Circuit has held that "[w]hen the trustee's interpretation of a plan is in direct conflict with express language in a plan, this action is a very strong indication of arbitrary and capricious behavior." *Batchelor v. International Brotherhood of Electrical Workers Local 861 Pension*

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[8] *See, e.g., Kennedy v. Electricians Pension Plan, IBEW #995*, 954 F.2d 1116, 1121 (5th Cir. 1992); *Lickteig v. Business Men's Assurance Co. of America*, 61 F.3d 579, 584 (8th Cir. 1995).

[9] In *Lickteig*, the court relied, among other things, on Fourth and Sixth Circuit cases cited above. Although the court found that some factors supported the trustees' interpretation, they were "insufficient to overcome the fact that [the trustees'] interpretation runs contrary to the clear language of the Plan." *Id.* at 585.

and Retirement Fund, 877 F.2d 441, 445 (5th Cir. 1989). *See also, Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) (same).

No case cited by Petitioners in support of their claim that there is a conflict with the Ninth Circuit stands for any proposition contrary to the above. Rather, those cases (*see* Petition at 17-18) stand merely for the general proposition that where a deferential standard of review is appropriate, and where the plan contains *ambiguous* language, courts will defer to fiduciaries' interpretations. As demonstrated above, three of the five circuits to which Petitioners cite (the 3rd, 6th, and 7th) apply exactly the same common law principles applied by the Ninth Circuit here, and one of the others (the 5th) applies a similar principle. Not surprisingly, all but one of the decisions of these circuits cited by Petitioners involved *ambiguous* plan language.[10] Petitioners' Eleventh Circuit authorities similarly involved *ambiguous* plan language.[11]

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[10] As discussed above, the other one, *Batchelor v. International Brotherhood of Electrical Workers, Local 861*, 877 F.2d 441 (5th Cir. 1989), supports the Ninth Circuit's view.

[11] In *Guy v. Southwestern Iron Workers Welfare Fund*, 877 F.2d 37, 39-40 (11th Cir. 1989), the dispute centered on a subrogation agreement, not a governing plan document, and plaintiff prevailed. Petitioners also cite a pre-*Firestone*, case, *Griffis v. Delta Family – Care Disability*, 723 F.2d 822 (11th Cir. 1984), in which the plan language was not quoted.

3. These Consistent Principles of Federal Common Law Adopted by the Circuits Are Consistent with *Firestone* and Are Appropriate In View of the Purposes of ERISA.

As discussed above, the Ninth Circuit did not "abrogate" or "pervert" (Petition at 16) the requirement of judicial deference or the standard of review articulated in *Firestone*. To the contrary, in *Canseco*, it followed its own and other circuits' consistent post-*Firestone* common law standards. Nothing in these standards is inconsistent with deferring to fiduciaries' interpretations of governing plan instruments *where those instruments are ambiguous*. Thus, in *Firestone*, in determining that the deferential standard of review should not apply under the facts, this Court stated that "there is no evidence that under Firestone's termination pay plan the administrator has the power to construe *uncertain terms*. . . . " 489 U.S. at 112, 109 S.Ct. at 955, 103 L.Ed. 2d at 955; emphasis supplied. In other words, it is only "uncertain" plan provisions that give rise to a deferential standard of review.

In contrast, where a plan instrument is *unambiguous*, it truly would be a "perversion" of ERISA to allow plan fiduciaries to deny benefits based on these fiduciaries' or their predecessors' supposed intentions or practices which are contrary to the plain meaning of the plan's governing instruments. ERISA requires that all plans be governed by written instruments which specify the basis on which payments are to be made from the plan. 29 U.S.C. §1102(a)(1), 1102(b)(4). ERISA further provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and

instruments governing the plan. . . . " 29 U.S.C. §1104(a)(1)(D). The drafters of ERISA believed "[f]idelity to the written terms of an employee benefit plan [to be] essential to give effect to one of ERISA's central purposes – to protect the participants and beneficiaries of employee benefit plans by insuring that employees are fully and accurately apprised of their rights under the plan." *Callahan v. Rouge Steel Co.*, 941 F.2d 456, 459 (6th Cir. 1991) (citing H.R. Rep. No. 533, 93d Cong. (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4648-49, 4657).

The principles followed by the Ninth Circuit in *Canseco* and by other courts of appeals properly reflect the importance of "fidelity" to the written terms of employee benefit plans. Surely, this vital intention at the heart of ERISA should be reflected in the federal common law of rights and obligations which this Court has instructed the lower courts to develop in interpreting employee benefit plans.

In their Petition, the Trustees argue extensively about the history of the CLPT plan's application provision, the history of their interpretations of that provision, and their supposed reasonableness in adopting and continuing to include that provision in the plan. Petition at 13-15. However, as discussed above, several circuits have held that extrinsic evidence is irrelevant where the plan language is unambiguous. Consequently, examination of either Petitioners' one-sided version of the facts or a complete

version of the facts is irrelevant under the federal common law principles articulated above.[12]

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[12] The one-sidedness of the Trustees' recital of extrinsic evidence is demonstrated by their omission of any discussion of the language of the summary plan description issued by the CLPT. In fact, the ERISA-mandated summary plan description, like the CLPT plan itself, lists only three eligibility requirements. It does not state that application is such a requirement, nor does it state that vested benefits may be lost as a result of late application. E.R. at 185-186. *See* 29 C.F.R. § 2520.102-2(b) and -3(1) (summary plan description must clearly identify circumstances which may result in loss of benefits, must not mislead or fail to inform participants).

CONCLUSION

For all of the foregoing reasons, Respondents pray the petition for a writ of certiorari be denied.

Date: February 12, 1997

Respectfully submitted,

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